TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 136.

SPOKANE & INLAND EMPIRE RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED APRIL 27, 1914.

(24,186)



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COPY BOUND TO

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1 & 2 In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 1261.

UNITED STATES OF AMERICA, Plaintiff,
vs.
SPOKANE & INLAND EMPIRE RAILROAD COMPANY, Defendant.

Complaint.

Now comes the United States of America, by Oscar Cain, United States Attorney for the Eastern District of Washington, and brings this action on behalf of the United States against the Spokane & Inland Empire Railroad Company, a corporation organized and doing business under the laws of the State of Washington, and having an office and place of business at Spokane, in the State of Washington; this action being brought upon suggestion of the Attorney General of the United States at the request of the Interstate Commerce Commission, and upon information furnished by said Commission.

For a First Cause of Action

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an
3 Act approved April 1, 1896 (contained in 29 Statutes at Large, page 943), said defendant on October 23, 1911, hauled on its line of railroad one car, to-wit: I. E. S. 304, which said line of railroad at said time was a highway of interstate commerce.

Plaintiff further alleges that on said date defendant hauled said car as aforesaid over its line of railroad easterly from Spokane, in the State of Washington, within the jurisdiction of this court, when the grab irons or handholds were missing from the ends of said car, and when said ends of said car were not provided with secure grab irons or handholds, for greater security to men in coupling and uncoupling cars, as required by section 4 of said Safety Appliance Act, as amended.

Plaintiff further alleges that by reason of the violation of said Act of Congress defendant is liable to plaintiff in the sum of one hundred dollars.

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For a Second Cause of Action

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by an Act approved March 2, 1903
4 (contained in 32 Statutes at Large, page 943), said defendant on October 23, 1911, hauled on its line of railroad one car, to-wit: I. E. S. 303, which said line of railroad at said time was a highway of interstate commerce.

Plaintiff further alleges that on said date defendant hauled said car as aforesaid over its line of railroad easterly from Spokane in the State of Washington, within the jurisdiction of this court, when the grab irons or handholds were missing from the ends of said car and when said ends of said car were not provided with secure grab irons or handholds, for greater security to men in coupling and uncoupling cars, as required by section 4 of said Safety Appliance Act, as amended.

Plaintiff further alleges that by reason of the violation of said Act of Congress defendant is liable to plaintiff in the sum of one hundred dollars.

For a Third Cause of Action

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by an Act approved March 2, 1903 contained in 32 (Statutes at Large, page 943), said defendant on October 23, 1911, hauled on its line
5 of railroad one car, to-wit: I. E. S. 305, which said line of railroad at said time was a highway of interstate commerce.

Plaintiff further alleges that on said date defendant hauled said car as aforesaid over its line of railroad easterly from Spokane in the State of Washington within the jurisdiction of this court, when the grab irons or handholds were missing from the ends of said car and when said ends of said car were not provided with secure grab irons or handholds, for greater security to men in coupling and uncoupling cars, as required by section 4 of said Safety Appliance Act, as amended.

Plaintiff further alleges that by reason of the violation of said Act of Congress defendant is liable to plaintiff in the sum of one hundred dollars.

For a Fourth Cause of Action

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by an Act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), said defendant on October 23, 1911, hauled on its line of railroad one car, to-wit: I. E. S. 63, which said line of railroad at said time was a highway of interstate commerce.

6 Plaintiff further alleges that on said date defendant hauled said car as aforesaid over its line of railroad easterly from Spokane in the State of Washington within the jurisdiction of this court, when the grab irons or handholds were missing from the ends of said car and when said ends of said car were not provided with secure grab irons or handholds, for greater security to men in coupling and uncoupling cars, as required by section 4 of said Safety Appliance Act, as amended.

Plaintiff further alleges that by reason of the violation of said Act of Congress defendant is liable to plaintiff in the sum of one hundred dollars.

For a Fifth Cause of Action

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by an Act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), said defendant on October 23, 1911, hauled on its line of railroad one car, to-wit: I. E. S. 17, which said line of railroad at said time was a highway of interstate commerce.

Plaintiff further alleges that on said date defendant hauled said car as aforesaid over its line of railroad easterly from Spokane

7 in the State of Washington, within the jurisdiction of this court, when the grab irons or handholds were missing from the ends of said car, and when said ends of said car were not provided with secure grab irons or handholds, for greater security to men in coupling and uncoupling cars, as required by section 4 of said Safety Appliance Act, as amended.

Plaintiff further alleges that by reason of the violation of said Act of Congress defendant is liable to plaintiff in the sum of one hundred dollars.

For a Sixth Cause of Action

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by an Act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), said defendant on October 23, 1911, hauled on its line of railroad one car, to-wit: I. E. S. 65, which said line of railroad at said time was a highway of interstate commerce.

Plaintiff further alleges that on said date defendant hauled said car as aforesaid over its line of railroad easterly from Spokane in the State of Washington, within the jurisdiction of this court,
8 when the grab irons or handholds were missing from the ends of said car, and when said ends of said car were not provided with secure grab irons or handholds, for greater security to men in coupling and uncoupling cars, as required by section 4 of said Safety Appliance Act, as amended.

Plaintiff further alleges that by reason of the violation of said Act of Congress defendant is liable to plaintiff in the sum of one hundred dollars

For a Seventh Cause of Action

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by an Act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), said defendant in October 23, 1911, hauled on its line of railroad one car, to-wit: I. E. S. 300, which said line of railroad at said time was a highway of interstate commerce.

Plaintiff further alleges that on said date defendant hauled said car as aforesaid over its line of railroad easterly from Spokane in the State of Washington, within the jurisdiction of this court, when the grab irons or handholds were missing from the ends of said car, and when said ends of said car were not provided
9 with secure grab irons or handholds, for greater security to men in coupling and uncoupling cars, as required by section 4 of said Safety Appliance Act, as amended.

Plaintiff further alleges that by reason of the violation of said Act of Congress defendant is liable to plaintiff in the sum of one hundred dollars.

For an Eighth Cause of Action

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by an Act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), said defendant on October 23, 1911, hauled on its line of railroad one car, to-wit: I. E. S. 30, which said line of railroad at said time was a highway of interstate commerce.

Plaintiff further alleges that on said date defendant hauled said car as aforesaid over its line of railroad easterly from Spokane in the State of Washington, within the jurisdiction of this court, when the grabirons or handholds were missing from the sides of said car, and when said sides of said car were not provided with secure grab irons or handholds, for greater security to men in coupling
10 and uncoupling cars, as required by section 4 of said Safety Appliance Act, as amended.

Plaintiff further alleges that by reason of the violation of said Act of Congress defendant is liable to plaintiff in the sum of one hundred dollars.

For a Ninth Cause of Action

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by an Act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), said defendant on October 23, 1911, hauled on its line of railroad one car, to-wit: I. E. S. 18, which line of railroad at said time was a highway of interstate commerce.

Plaintiff further alleges that on said date defendant hauled said car as aforesaid over its line of railroad easterly from Spokane in the State of Washington, within the jurisdiction of this court, when the grab irons or handholds were missing from the ends of said car, and when said ends of said car were not provided with secure grab irons or handholds, for greater security to men in coupling and uncoupling cars, as required by section 4 of said Safety Appliance Act, as amended.

11 Plaintiff further alleges that by reason of the violation of said Act of Congress defendant is liable to plaintiff in the sum of one hundred dollars.

For a Tenth Cause of Action

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by an Act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), said defendant on October 23, 1911, hauled on its line of railroad one car, to-wit: I. E. S. 10, which said line of railroad was at said time a highway of interstate commerce.

Plaintiff further alleges that on said date defendant hauled said car as aforesaid over its line of railroad easterly from Spokane in the State of Washington within the jurisdiction of this court, when the grab irons or handholds were missing from the ends of said car, and when said ends of said car were not provided with secure grab irons or handholds, for greater security to men in coupling and uncoupling cars, as required by section 4 of said Safety Appliance Act, as amended.

Plaintiff further alleges that by reason of the violation of
12 said Act of Congress defendant is liable to plaintiff in the sum of one hundred dollars.

For an Eleventh Cause of Action

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by an Act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), said defendant on October 23, 1911, hauled on its line of railroad one car, to-wit: I. E. S. 12, which said line of railroad at said time was a highway of interstate commerce.

Plaintiff further alleges that on said date defendant hauled said car as aforesaid over its line of railroad easterly from Spokane in the State of Washington, within the jurisdiction of this court, when the grab iron or handhold was missing from the side of the car near "A" end of said car, and when said side of said car was not provided with secure grab irons or handholds for greater security to men in coupling and uncoupling cars, as required by section 4 of said Safety Appliance Act, as amended.

Plaintiff further alleges that by reason of the violation of said Act of Congress defendant is liable to plaintiff in the sum of one hundred dollars.

13 For a Twelfth Cause of Action

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act approved April 1, 1896 (contained in 29 Statutes at Large, page 85) and as amended by an Act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), said defendant on October 23, 1911, hauled on its line of railroad one car, to-wit: I. E. S. 27, which said line of railroad at said time was a highway of interstate commerce.

Plaintiff further alleges that on said date defendant hauled said car as aforesaid over its line of railroad easterly from Spokane in the State of Washington, within the jurisdiction of this Court, when the grab irons or handholds were missing from the ends of said car, and when said ends of said car were not provided with secure grab irons or handholds for greater security to men in coupling and uncoupling cars, as required by section 4 of said Safety Appliance Act, as amended.

Plaintiff further alleges that by reason of the violation of said Act of Congress defendant is liable to plaintiff in the sum of one hundred dollars.

For a Thirteenth Cause of Action

14 plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by an Act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), said defendant, on October 23, 1911, hauled on its line of railroad one car, to-wit: I. E. S. 10, which said line of railroad at said time was a highway of interstate commerce.

Plaintiff further alleges that on said date defendant hauled said car as aforesaid over its line of railroad easterly from Spokane in the State of Washington, within the jurisdiction of this Court, when the coupling and uncoupling appar-tus on the "A" end of said car consisted of what is known as the link and pin coupler, thus necessitating a man or men going between the ends of the cars to couple or uncouple them, and when said car was not equipped with couplers coupling automatically by impact, and which could be uncoupled without the necessity of a man or men going between the ends of the cars, as required by Section 2 of the Safety Appliance Act, as amended by Section 1 of the Act of March 2, 1903.

Plaintiff further alleges that by reason of the violation of the said Act of Congress, as amended, defendant is liable to plain-
15 tiff in the sum of one hundred dollars.

For a Fourteenth Cause of Action

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by an Act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), said defendant, on October 23, 1911, hauled on its line of railroad one car, to-wit: I. E. S. 50, which said line of railroad at said time was a highway of interstate commerce.

Plaintiff further alleges that on said date defendant hauled said car as aforesaid over its line of railroad easterly from Spokane in the State of Washington, within the jurisdiction of this Court, when the coupling and uncoupling apparatus on the "A" end of said car consisted of what is known as a link and pin coupler, thus necessitating a man or men going between the ends of the cars to couple or uncouple them, and when said car was not equipped with couplers coupling automatically by impact, and which could be uncoupled without the necessity of a man or men going between the
16 ends of the cars, as required by Section 2 of the Safety Appliance Act, as amended by Section 1 of the Act of March 2, 1903.

Plaintiff further alleges that by reason of the violation of the said Act of Congress, as amended, defendant is liable to plaintiff in the sum of one hundred dollars.

For a Fifteenth Cause of Action

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act Approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by an Act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), said defendant, on October 23, 1911, hauled on its line of railroad one car, to-wit: I. E. S. 4, which said line of railroad at said time was a highway of interstate commerce;

Plaintiff further alleges that on said date defendant hauled said car as aforesaid over its line of railroad easterly from Spokane in the State of Washington, within the jurisdiction of this Court, when the coupling and uncoupling apparatus on the "A" end of said car consisted of what is known as a link and pin coupler, thus necessitating a man or men going between the ends of the cars to couple or un-

couple them, and when said car was not equipped with
17 couplers coupling automatically by impact, and which could be uncoupled without the necessity of a man or men going between the ends of the cars, as required by Section 2 of the Safety Appliance Act, as amended by Section 1, of the Act of March 2, 1903.

Plaintiff further alleges that by reason of the violation of the said Act of Congress, as amended, defendant is liable to plaintiff in the sum of one hundred dollars.

Wherefore, plaintiff prays judgment against said defendant in the sum of fifteen hundred dollars and its costs herein expended.

(Signed) OSCAR CAIN,
United States Attorney.

Endorsements: Complaint. Filed January 3, 1912. W. H. Hare, Clerk. By S. M. Russell, Deputy.

In the District Court of the United States for the Eastern District of Washington, Northern Division.

UNITED STATES OF AMERICA, Plaintiff,
vs.
SPOKANE & INLAND EMPIRE RAILROAD COMPANY, a Corporation, Defendant.

Answer.

Defendant makes the following answer to the complaint of plaintiff:

I.

Answering the first cause of action set forth in the complaint of plaintiff, defendant admits that it is and was during all the
18 times mentioned in said complaint, a common carrier, engaged in interstate commerce by interurban electric railway in the State of Washington; that on October 23rd, 1911, it hauled on its said line of electric railway one car, to-wit: I. E. S. 304, which said line of electric railway at said time was a highway of interstate commerce; and defendant denies each and every allegation, matter and thing in said first cause of action alleged, which has not been herein specifically admitted.

II.

Answering the second cause of action set forth in the complaint of plaintiff, defendant admits that it is and was during all the times mentioned in said complaint, a common carrier engaged in interstate commerce by interurban electric railway in the State of Washington, that on October 23rd, 1911, it hauled on its said line of electric railway, one car, to-wit: I. E. S. 303, which said line of electric railway at said time was a highway of interstate commerce; and

defendant denies each and every allegation, matter and thing in said second cause of action alleged, which has not been herein specifically admitted.

III.

Answering the third cause of action set forth in the complaint of plaintiff, defendant admits that it is and was during all the times mentioned in said complaint a common carrier engaged in interstate commerce by interurban electric railway in the State of Washington; that on October 23rd, 1911, it hauled on its said line of elec-
19 tric railway one car, to-wit: I. E. S. 305, which said line of electric railway at said time was a highway of interstate commerce; and defendant denies each and every allegation, matter and thing in said third cause of action alleged, which has not been herein specifically admitted.

IV.

Answering the fourth cause of action set forth in the complaint of plaintiff, defendant admits that it is and was during all the times mentioned in said complaint a common carrier engaged in interstate commerce by interurban electric railway in the State of Washington; that on October 23rd, 1911, it hauled on its said line of electric railway one car, to-wit: I. E. S. 63, which said line of electric railway at said time was a highway of interstate commerce; and defendant denies each and every allegation, matter and thing in said fourth cause of action alleged, which has not been herein specifically admitted.

V.

Answering the fifth cause of action set forth in the complaint of plaintiff, defendant admits that it is and was during all the times mentioned in said complaint, a common carrier engaged in interstate commerce by interurban electric railway in the State of Washington; that on October 23rd, 1911, it hauled on its said line of electric railway one car, to-wit: I. E. S. 17, which said line of electric railway at said time was a highway of interstate commerce; and defendant denies each and every allegation, matter and thing in said fifth cause of action, alleged, which has not been herein specifically admitted.

20 VI.

Answering the sixth cause of action set forth in the complaint of plaintiff, defendant admits that it is and was during all the times mentioned in said complaint a common carrier engaged in interstate commerce by interurban electric railway in the State of Washington; that on October 23rd, 1911, it hauled on its said line of electric railway one car, to-wit: I. E. S. 65, which said line of electric railway at said time was a highway of interstate commerce; and defendant denies each and every allegation, matter and thing in said sixth cause of action alleged, which has not been herein specifically admitted.

VII.

Answering the seventh cause of action set forth in the complaint of plaintiff, defendant admits that it is and was during all the times mentioned in said complaint, a common carrier engaged in interstate commerce by interurban electric railway in the State of Washington; that on October 23rd, 1911, it hauled on its said line of electric railway one car, to-wit: I. E. S. 300, which said line of electric railway at said time was a highway of interstate commerce; and defendant denies each and every allegation, matter and thing in said seventh cause of action alleged, which has not been herein specifically admitted.

VIII.

Answering the eighth cause of action set forth in the complaint of plaintiff, defendant admits that it is and was during all the time mentioned in said complaint, a common carrier engaged in
21 interstate commerce by interurban electric railway in the State of Washington; that on October 23rd, 1911, it hauled on its said line of electric railway one car, to-wit: I. E. S. 30, which said line of electric railway was a highway of interstate commerce; and defendant denies each and every allegation, matter and thing in said eighth cause of action alleged, which has not been herein specifically admitted.

IX.

Answering the ninth cause of action set forth in the complaint of plaintiff, defendant admits that it is and was during all the times mentioned in said complaint, a common carrier engaged in interstate commerce by interurban electric railway in the State of Washington; that on October 23rd, 1911, it hauled on its said line of electric railway one car, to-wit: I. E. S. 18, which said line of electric railway at said time was a highway of interstate commerce; and defendant denies each and every allegation, matter and thing in said ninth cause of action alleged, which has not been herein specifically admitted.

X.

Answering the tenth cause of action set forth in the complaint of plaintiff, defendant admits that it is and was during all the times mentioned in said complaint, a common carrier engaged in interstate commerce by interurban electric railway in the State of Washington; that on October 23rd, 1911, it hauled on its said line of electric railway one car, to-wit: I. E. S. 10, which said line of electric railway at said time was a highway of interstate commerce;
22 and defendant denies each and every allegation, matter and thing in said tenth cause of action alleged, which has not been herein specifically admitted.

XI.

Answering the eleventh cause of action set forth in the complaint of plaintiff, defendant admits that it is and was during all the times mentioned in said complaint a common carrier engaged in interstate commerce by interurban electric railway in the State of Washington; that on October 23rd, 1911, it hauled on its said line of electric railway one car, to-wit: I. E. S. 12, which said line of electric railway at said time was a highway of interstate commerce; and defendant denies each and every allegation, matter and thing in said eleventh cause of action alleged, which has not been herein specifically admitted.

XII.

Answering the twelfth cause of action set forth in the complaint of plaintiff, defendant admits that it is and was during all the times mentioned in said complaint a common carrier engaged in interstate commerce by interurban electric railway in the State of Washington; that on October 23rd, 1911, it hauled on its said line of electric railway one car, to-wit: I. E. S. 27, which said line of electric railway at said time was a highway of interstate commerce; and defendant denies each and every allegation, matter and thing in said twelfth cause of action alleged, which has not been herein specifically admitted.

23 XIII.

Answering the thirteenth cause of action set forth in the complaint of plaintiff, defendant admits that it is and was during all the times mentioned in said complaint, a common carrier engaged in interstate commerce by interurban electric railway in the State of Washington; that on October 23rd, 1911, it hauled on its said line of electric railway one car, to-wit: I. E. S. 10, which said line of electric railway at said time was a highway of interstate commerce; and defendant further admits that on said date it hauled said car over its line of electric railway easterly from Spokane, in the State of Washington, within the jurisdiction of this Court, when the coupling and uncoupling apparatus on the "A" end of said car consisted of what is known as the link and pin coupler, and when said car was not equipped with couplers coupling automatically by impact, and defendant denies each and every allegation, matter and thing in said thirteenth cause of action alleged, which has not been herein specifically admitted.

XIV.

Answering the fourteenth cause of action set forth in the complaint of plaintiff, defendant admits that it is and was during all the times mentioned in said complaint a common carrier engaged in interstate commerce by interurban electric railway in the State of Washington; that on October 23rd, 1911, it hauled on its said line of electric railway one car, to-wit: I. E. S. 50, which said line of

electric railway at said time was a highway of interstate com-
24 merce; and defendant further admits that on said date it hauled said car over its line of electric railway easterly from Spokane, in the State of Washington, within the jurisdiction of this Court, when the coupling and uncoupling apparatus on the "A" end of said car consisted of what is known as the link and pin coupler, and when said car was not equipped with couplers coupling automatically by impact, and defendant denies each and every allegation, matter and thing in said fourteenth cause of action alleged, which has not been herein specifically admitted.

XV.

Answering the fifteenth cause of action set forth in the complaint of plaintiff, defendant admits that it is and was during all the times mentioned in said complaint, a common carrier engaged in interstate commerce by interurban electric railway in the State of Washington; that on October 23rd, 1911, it hauled on its said line of electric railway one car, to-wit: I. E. S. 4, which said line of electric railway at said time was a highway of interstate commerce; and defendant further admits that on said date it hauled said car over its line of electric railway easterly from Spokane, in the State of Washington, within the jurisdiction of this Court, when the coupling and uncoupling apparatus on the "A" end of said car consisted of what is known as the link and pin coupler, and when said car was not equipped with couplers coupling automatically by impact, and defendant denies each and every allegation, matter and thing in said fifteenth cause of action alleged, which has not been herein specifically admitted.

25 Further answering the complaint of the plaintiff, and for an affirmative defense to each and every cause of action pleaded therein, this defendant alleges that each and every car referred to in each of the said several causes of action, has been at all times and was on the dates set forth in the complaint of plaintiff, used by this defendant upon its line of street railway.

Wherefore, having fully answered the complaint of plaintiff, defendant demands judgment against the plaintiff; that this action against it be dismissed; that it go hence without day and recover of the plaintiff its costs.

(Signed) GRAVES, KIZER & GRAVES,
Attorneys for Defendant.

STATE OF WASHINGTON,
County of Spokane, ss:

W. G. Davidson, being first duly sworn, on oath deposes and says: that he is one of the officers of the Spokane & Inland Empire Railroad Company, a corporation, defendant above named, to-wit: its secretary, and as such officer makes this verification for and on behalf of said corporation; that he has read the above and foregoing answer, knows the contents thereof and believes the same to be true.

(Signed) W. G. DAVIDSON.

Subscribed and sworn to before me this 24th day of January, 1912.

(Signed) C. H. SCHWELLENBACH,
Notary Public in and for the State of
[NOTARIAL SEAL.] *Washington, Residing at Spokane.*

26 Endorsements: Service of the within answer is hereby acknowledged this 24th day of January, 1912. Oscar Cain, U. S. Attorney and Attorney for Plaintiff. Filed in the U. S. District Court, Eastern District of Washington, March 11, 1912. W. H. Hare, Clerk. By S. M. Russell, Deputy.

In the District Court of the United States for the Eastern District of Washington, Northern Division.

UNITED STATES OF AMERICA, Plaintiff,
vs.
SPOKANE & INLAND EMPIRE RAILROAD COMPANY, Defendant.

Reply.

Comes now the United States of America, and for reply to the affirmative defense of the defendant to each and every cause of action in the complaint herein, denies each and every allegation, matter and thing contained in said affirmative defenses and each of them.

(Signed) OSCAR CAIN,
United States Attorney.
(Signed) E. C. MACDONALD,
Assistant United States Attorney.

Endorsements: Reply. Filed February 10, 1912. W. H. Hare, Clerk. By S. M. Russell, Deputy.

27 In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 1261.

UNITED STATES OF AMERICA, Plaintiff,
vs.
SPOKANE & INLAND EMPIRE RAILROAD COMPANY, a Corporation, Defendant.

Verdict.

We, the jury in the above-entitled cause, find the defendant guilty of the violation of the Safety Appliance Act as charged in counts numbered thirteen, fourteen and fifteen of the complaint and guilty as to counts from one to twelve inclusive.

(Signed) W. H. COCHRAN, *Foreman.*

Endorsements: Verdict. Filed April 18th, 1912. W. H. Hare, Clerk. By Frank C. Nash, Deputy.

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In the District Court of the United States, Eastern District of Washington, Northern Division.

UNITED STATES OF AMERICA, Plaintiff,
vs.
SPOKANE & INLAND EMPIRE RAILROAD COMPANY, a Corporation, Defendant.

Motion for Judgment.

Defendant moves the Court to enter judgment in its
28–33 favor, dismissing the action, and for costs, notwithstanding the verdict returned herein by the jury, for the reason that said verdict is contrary to law and to the undisputed evidence in the case, and under the law and the facts defendant is entitled to judgment, as herein demanded.

(Signed) GRAVES, KIZER & GRAVES,
Attorneys for Defendant.

Endorsements: Service of the within motion for judgment is hereby acknowledged this — day of April, 1912. (Signed) Oscar Cain, Attorney for Plaintiff. Motion for judgment. Filed April 18, 1912. W. H. Hare, Clerk. By S. M. Russell, Deputy.

* * * * * * *

34 In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1261.

UNITED STATES OF AMERICA, Plaintiff,
vs.
SPOKANE & INLAND EMPIRE RAILROAD COMPANY, Defendant.

Petition for a New Trial.

Defendant prays the Court to grant it a new trial in the above-entitled action for the following causes:

1. Insufficiency of the evidence to justify the verdict returned herein. The evidence was insufficient to justify the verdict for the reasons:

(*a*) That it appears that the cars referred to in plaintiff's complaint and in the evidence herein were cars which are used upon a street car line, and being so used do not come within the operation of the Act of Congress relied upon, and on account of the alleged violation of which recovery was sought herein.

(*b*) That it appears that the hand-holds, or grab-irons in the buffer or sill at the ends of such cars were sufficient within the meaning of the Act of Congress relied upon, and that if the cars do

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come within the purview of such act, there was no violation
35 thereof because the appliances above referred to were sufficient.

2. Error in law occurring at the trial and excepted to at the time by the defendant. The particular errors relied upon are:

(*a*) The exclusion of the testimony of skilled and experienced railway men who had examined the cars in question and of whom plaintiff inquired as to the sufficiency of the hand-holds in the buffers or sills of such cars.

(*b*) Rejecting defendant's offer to prove by skilled and experienced railway men who had examined the cars in question that the hand-holds or grab-irons in the buffers or sills of such cars were sufficient to accomplish the purpose intended to be accomplished by the provisions of the act, and better than those commonly in use upon the cars used in interstate commerce.

(*c*) In denying defendant's motion for a non-suit.

(*d*) In denying defendant's motion to instruct the jury to return a verdict in defendant's favor.

(*e*) In instructing the jury to return a verdict of guilty against the defendant on the last three counts of the complaint.

This petition is based and will be heard upon the pleadings herein, upon the record of the Court, of the minutes of the Court, and the bill of exceptions prepared by defendant.

(Signed) GRAVES, KIZER & GRAVES,
Attorneys for Defendant.

36–44 Endorsements: Service of within petition for new trial is hereby acknowledged this 10th day of October, 1912. (Signed) Oscar Cain, United States Attorney. Petition for New Trial. Filed October 10, 1912. W. H. Hare, Clerk. By S. M. Russell, Deputy.

* * * * * * *

45 In the District Court of the United States for the Eastern District of Washington, Northern Division.

UNITED STATES OF AMERICA, Plaintiff,
vs.
SPOKANE & INLAND EMPIRE RAILROAD COMPANY, Defendant.

Bill of Exceptions.

Be it remembered that the above entitled cause came on for hearing in the above entitled Court on Wednesday, April 27, 1912,
46 before the Honorable F. H. Rudkin, judge presiding, plaintiff being represented by its attorneys, Oscar Cain, district attorney, and Philip J. Doherty, Esq., and the defendant being represented by its attorneys, Graves, Kizer & Graves, and the following proceedings were had, to-wit:

The jury was empaneled and sworn according to law, and there-

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upon the plaintiff, to sustain the issue upon its part, offered the testimony of the following witnesses as its evidence in chief:

GEORGE B. WINTER, being duly sworn, testified as follows:

"I am a safety appliance inspector for the Interstate Commerce Commission, and on October 23, 1911, made an inspection of the cars of the Spokane & Inland Empire Railroad Company in Spokane. I inspected passenger coach 304, and found that both end handholds on both ends of the car were missing. I mean by hand-holds what are commonly known by railroad men as grab-irons. They are placed usually on the end sill of the car for the protection of the men in coupling and uncoupling hose. It is customary to have four hand-holds, one on each side of the coupler, and two on each end, and these were all missing. This was a passenger car in a train with other cars. At this point it was admitted that the train in which this car was placed was destined for Cœur d'Alene, Idaho, and was run through to that place; that it was run outside of the city limits of Spokane over the private right of way of the Spokane & Inland Empire Railroad Company, over a highway of Interstate
47 Commerce. It was also admitted that the car and the train in which it was run from the passenger station in Spokane through the streets of that city over the street railway lines of the company to the point where the private right of way of the company was reached and from there it was run on such private right of way to Cœur d'Alene.) I examined that car afterwards at Allan, Idaho, and it was in the same condition at that time. (It was admitted by defendant that the other cars referred to in the first twelve counts of the complaint were in the same condition with respect to hand-holds as was car 304 concerning which the witness testified, and that it was unnecessary to produce testimony as to each of the twelve cars.) Coming to count 13 of the complaint, I examined three cars in train extra No. 4 of the Spokane & Inland Empire Railroad Company. Motor and coach No. 4 and coach No. 50, and Motor and coach No. 10 had what are commonly known as link and pin couplings. In order to couple these cars, it would be necessary for a man to go between them and use the link and pin. I rode on this train to Allan, Idaho. It was a passenger train. (Defendant admitted that the same condition was true as to the cars referred to in the last two counts of the complaint.) The trains of defendant company leave from the depot in the city and the motor car or motor and baggage was the first car. Then the other cars, whether there were two or three, were coupled to it in consecutive order. These trains went out over the street-car tracks. They are operated by train orders
48 and made up with markers, as required by the standard rules. Some of them handle baggage and express. Freight is handled over the line in freight cars. In going out from the terminal station in Spokane, these trains go eastward over one of the main thoroughfares of the city, and run by the brewery and the Northern Pacific round house, across two Spokane river bridges, and then parallel to the Northern Pacific towards Cœur d'Alene. I believe

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that route is the direct route out of the terminal station. It might be considered so.

Cross-examination:

The cars handling freight are not brought down to the passenger station over the city streets. They stop at the freight terminals, and the cars handling freight are not run over the street railway line. This road is an electric railroad operated by trolley cars, and the cars are run from the yards of the company over street railway lines through the streets of the City of Spokane from the freight yards of the company down to the passenger station. They are operated over street railway lines, tracks laid in the street over which street railway cars run. The front of the cars which I inspected were constructed in a different manner from that of cars used on the steam railroads, due to the curvature, necessitating the car going around street angles. There is a radial coupler and a heavy steel sill that is round on the corners. That radial coupler swings from one side to the other across the whole front of the car. It is necessary that it should do so, and that the corners should be rounded so that the cars can make
49 the turns on the street railway lines. The cars used on steam railroads are practically square. The sill or buffer under which the coupler swings is not found on steam cars. In that buffer or sill on each side of the coupler, measuring from 18 to 22 inches in length and from 2¼ to 3 inches of clearance, and about 25 or 26 inches from the center of the car, is an opening. There was such an opening on each side of the coupler. Those openings were on each end of all the coaches and most of the motors. The baggage and mail car has a solid sill, but on all the coaches and motor-cars used for passenger business I found those openings. I observed the cars that I have referred to and which were not equipped with the automatic coupler. They were ordinary traction cars, small in construction. I would consider it a street car. It would be impossible to equip such a car with automatic couplers." (Thereupon it was admitted that all of the cars referred to in the complaint moved on the day alleged in the complaint, and that inspector Hayes, if called, would testify as to the condition of the cars in all respects, both upon direct and cross-examination, as inspector Winter had testified.)

Thereupon the plaintiff rested, and the defendant to sustain the issues upon its part then offered the testimony of the following witnesses as its evidence in chief.

W. C. Mock, being duly sworn, testified as follows:

"I am the resident engineer of the Spokane & Inland Em-
50 pire Railroad Company. The cars of that company in coming down from its freight yards to its passenger station are obliged to pass around a number of curves in the street. At Market street there is about a 36 degree curve. At the corner of Market and Main, where the street railway line turns from Market street into Main, there is a 73 degree curve. At the passenger station where the line turns from Main avenue into Lincoln street, there is practically a 100 degree curve. The maximum curve used on steam railways

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does not go much over a 4 degree curve, though on difficult construction a 10 degree to 14 degree curve is used, but that is the limit, while on the street railway line over which these cars are running to and from the freight yards down to the passenger station, you get from a 36 degree curve up to 100 degrees. The coupler that is used on these cars swings clear across the car from one side to another under the end sill or buffer of the car. It is necessary that it should be made to so swing because of the extremely short curves on the city streets going into the passenger station. Over the top of the buffer is an angle iron, 3½ inches wide and 9 inches high, and of half inch material, that extends across the end of the car. On either side of the coupler there is an opening in this angle iron which is 22½ inches long and 2½ inches wide and is back 3½ inches from the front of the buffer."

Cross-examination:

"The cars were not made according to my designs, and I do not know whether the openings were constructed for any par-
51 ticular purpose. All the passenger coaches were uniformly equipped, as I have stated. There are no solid sills on passenger coaches, though there are on motors, motors and baggage cars which are sometimes used in passenger trains."

EDWARD E. LILLIE, being duly sworn, testified as follows:

"I am the superintendent of the defendant company in charge of its interurban system. I have been engaged in railroad work for 29 years in positions from telegraph operator to superintendent. The lines of the defendant company are operated by electricity. One line extends from Spokane to Cœur d'Alene, and then to Hayden Lake, Idaho. Another line from Spokane to Moscow, Idaho, and a third one from Spring Valley to Colfax, both in Washington. The company owns the city lines known as the Spokane Traction Company within the city limits, and one suburban line running out to Opportunity. Its passenger station is located at the corner of Main and Lincoln, very close to the center of the business part of the city. From the freight yards of the company, the passenger station is reached by all interurban trains by leaving the freight yards where they intersect Market street, using Market street to Main avenue, Main avenue to Lincoln, and Lincoln into the depot. The curves of the street railway lines on these streets are very abrupt, and it would not be possible to have them otherwise under the city ordinances. In making these curves, the coupler swings for almost the entire turn from one side of the car to the other, and so makes the turn in the streets. The
52 radial coupler is below, and not attached to the buffer or sill that has been spoken of. There is an iron below the buffer which sustains that radial coupler. It would not be possible to use these cars on the street railway lines over the city streets if the hand-holds or grab-irons were put below the buffer because the swing of the draw-bar, in turning the curves, would break them off. Prior to the act giving the Interstate Commerce Commission power

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to prescribe uniform systems of safety appliances, there was no uniformity in the grab-irons, or hand-holds, that were placed upon cars. Some put grab-irons on in one place, and some in another. But there was no uniformity with respect to their use, location, or anything of that sort. In the top of the buffer on these cars there is an opening in the angle iron about 22 inches long, 2 or 3 inches wide, and set back from the front of it about 3½ inches. From my experience as a railroad man, that opening would serve the purpose of a hand-hold. There is no other reason for it being there. The company has had some correspondence with the Interstate Commerce Commission relative to the form of hand-holds or grab-irons that should be put on the cars, and has made an effort to put some different form of hand-hold on than these openings. It does not comply with the requirements of the Interstate Commerce Commission for they require the hand-hold to be turned down, which would be impossible on these cars because the radial coupler, in making the swing at the curves would break them off. What
53 we have attempted to put on is turned up instead of down.

The cars referred to in the last three counts of the complaint, Inland Empire cars 4, 10 and 50, which are not equipped with an automatic coupler are a small interurban type of car used at the present time in the city limits. They are a large street-car. The trucks are low, the bodies are low, the draw bar being not over 18 inches from the rail, and it would not be possible to equip them with automatic couplers because the clearance would not be sufficient. These cars were used in interurban business on October 23d due to very heavy pressure of business caused by the race meeting at Allan, Idaho. They were made up in the shops at Spokane, and run solid from Spokane to Allan, Idaho, and from Allan back to Spokane. The trainmen were not required to and did not go between the cars to couple and uncouple them between the points mentioned. It would not be possible to couple these cars into a train with other cars. They must be left by themselves. It is a class of car to itself.

Cross-examination:

"The route over which these cars pass in coming into and out of the terminal station is the most direct route that could be taken. The same tracks that are used in the city streets are also used by our street cars. The track is a standard gauge 4 feet 8½ inch, and practically the standard weight of rail. It is substantially the same as the track on the interurban system except that we could not operate on any such curve on outside lines as there are
54 in the city. So far as the gauge is concerned, these trains are the same as the steam railroads. My superintendency is over the interurban lines. I do not control the street railway lines. On the interurban lines, tickets are sold for particular stations, the same as a railroad. We handle baggage for our passengers. Our trains are made up according to standard railroad rules with markers to designate the trains, and are run on schedules and by train orders. The employes who are engaged in the street

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car service do not have anything to do with the operation of the interurban service. They use the same tracks, however, that come from the freight depot to the passenger terminal in the heart of the city. We do not take passengers on the interurban trains within the city limits exclusively. We receive passengers at points within the city limits for transportation outside, and drop passengers on the interurban trains at various points within the city. But within the city limits we do no strictly street car business. I am familiar with the Master Car Builders' Book of Rules. It did not contemplate electric railways. According to that book of rules, the end sill has no connection with a hand-hold. I never saw an end sill like those on these cars before. I never saw on a steam railroad an end sill similar to what we have on the electric railroad. I never heard anyone describe them as a hand-hold. The openings in the end sills provide an absolute grab of the fingers, the hand. In addition to that you have got the full weight of the hand resting on the top in case you should lose your footing and be dropped. The man who is employed in coupling an air hose on such a train, and the train starts, could get something more than the ends of his fingers into that opening. I have tried it standing up, but never when I was stooping down in the position a man would be in who was coupling the hose. I have had no actual experience using it in actual coupling or uncoupling, but I have seen the process done many times. The purpose of a hand-hold is to afford security to a man who is between the cars if for any reason they should start. It is necessary for men to go between the cars and stoop down to connect the air hose and the electric light and heating wires. The man who is down between the cars is within four or five inches of the ground with his hands. If the car starts, he has to reach up 37 or 38 inches from the ground to get to the top of the end sill, and has to place his hand 3½ inches over the top of the sill if he reaches the opening, and then turn it an inch or three-quarters before he can get enough to grab on. I would not say that he could get nothing but the ends of his fingers in if he is stooping down and suddenly has to grab to save his life, but I don't believe I could get much more than the ends of my fingers up there myself."

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Redirect:

"The Spokane & Inland Empire Railroad Company owns both the street railway lines and the interurban lines, but has two superintendents, one for its street railway lines and another for its interurban lines. The stops on our interurban lines are from three to a mile to one for every mile, being nearer together as the city is approached. We do a local business, picking up people at cross-roads, bringing them in and taking them back. In going out of and coming into town on the street railway lines on the city streets we stop at all intersecting lines to take on and discharge passengers. The street railway lines are used for about a mile and a quarter."

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Recross:

"The cars in street railway service are generally operated singly, but not always so. Generally, two or more cars are used in the interurban service, though at the present time we are running some single cars."

B. S ROBERTSON, being first duly sworn, testified as follows:

"I am a railroad conductor, and have been in the employ of the Great Northern Railway for 23 years as brakeman, switchman, yardmaster, and conductor. I have had a great deal of experience in coupling and uncoupling cars, and in going between them, and am famailiar with the types of hand-holds provided ordinarily on steam railroads for the security of man going between the cars. In a general way, there is uniformity in such appliances and the place of their location. The Great Northern coaches have hand-holds on the ends of the cars, and no strips. The baggage cars have strips and no hand-holds on one side of the draw bar. Where there is a hand-hold on passenger coaches on steam roads, it is about midway from the bottom of the wooden sill to the bottom of the car above the track. The hand-holds that are used on steam
57 railroads are about the height of my shoulder above the track. I am 5 feet 10 or 11 inches, and the hand-hold would strike me just about the shoulder. I have examined the passenger coaches on the Spokane & Inland Empire Railroad Company with reference to the openings which it claims is a hand-hold in the buffer or sill of their cars."

Thereupon, counsel for defendant asked the witness then on the stand this question.

"What would you say of them as a safe and proper appliance; one that would tend to preserve men from injury who might have to go between the cars for any purpose."

Plaintiff's counsel thereupon objected to the question, stating that "the question is, is it a hand-hold." The Court sustained the objection "on the ground that it invades the province of the jury;" that defendant was seeking to prove by the witness the very question that the jury were to decide. Counsel for defendant thereupon made the following offer of proof:

"Now, if your honor pleases, I offer to prove by the witness on the stand, and I will call other witnesses, and particularly experienced railroad men, of years of experience, to prove by him and by them, by questions and answers addressed to them, that the opening in the beam or buffer of these electric cars is intended to subserve and does subserve the same purpose as the round iron appliance that is prescribed by the rules of the Interstate
58 Commerce Commission at the present time and is in use on steam railroads, that it is a better appliance than these are for the purpose of protecting men from injury who have to go between the cars. I offer to prove that and to ask questions of this witness to that effect."

Thereupon counsel for plaintiff objected to the offer, and the

Court sustained the objection upon the ground that it was not a question for expert testimony, but was a matter of common knowledge. Whereupon defendant asked and was allowed an exception and the witness was excused.

ARLINGTON MAHAN, being duly sworn, testified as follows:

"I am general foreman in the shops of the Spokane & Inland Empire Railroad Company. I am familiar with the passenger coaches of that company that have a buffer at the end and an opening in it. I was in the employ of the company at the time these cars or some of them were purchased. The openings were in the beam or sill when the cars were received. There ware handholds up and down on the sides of the cars when they were received. There were none on the ends of the cars in the place they are put on steam cars. I know of no reason for the openings on top of the angle iron on that beam. The men use them for grab-irons whenever they have occasion to couple or uncouple cars, or go between them. I have had occasion to couple and uncouple cars in that yard and other yards."

59 Thereupon counsel for defendant asked the following question:

"Does that opening in the top of the sill serve the same purpose and is it as well fitted for the purpose of protecting the lives and limbs of men who have occasion to go between the cars in the exercise of their duties as the form of grab-irons that is used on steam cars, that is brought below the end of the car."

Counsel for plaintiff objected to the question and the Court sustained the objection on the following grounds:

"I am of the opinion that this is one of the cases where witnesses must state facts and not conclusions, whether that is a reasonably safe appliance is within the knowledge of the ordinary man and no special experience is required."

Thereupon defendant asked and was allowed an exception to the ruling. The witness further testified:

"I am familiar with the form of grab-iron or hand-hold that is used on the passenger cars of steam railroads. It is attached to the end of the car, one on each corner, and projects downward. The Interstate Commerce Commission requires that they shall have a clearance of at least two inches, preferably two and a half, below the car sill. The handle runs different lengths. The Interstate Commerce Commission requires that it shall be not less than 16 inches inside clearance. There is one of these on each side of the draw bar. The opening in the angle iron in that

60 buffer on the Spokane & Inland Empire cars runs in length from 16 to 24 inches. It is from 2½ to 2¾ inches wide, and there is one of such openings on each side of the draw bar on both ends of the car, making four in all. It would be impossible to put on the passenger cars of the defendant such grab-irons as are in use on the cars of steam railroads because in going around the curves on the city streets the coupler would strike a brake.

And thereupon the following question was asked, and the following matters occurred:

"In your opinion, Mr. Mahan, and observation of these cars, is the opening in the angle bar a better and safer appliance for the safety of persons having occasion to go between the cars in the discharge of their duties than those that are used upon steam railroads?"

Mr. DOHERTY: The question is objected to.

The COURT: I will sustain the objection.

Mr. GRAVES: To which we take an exception.

Mr. GRAVES: I now offer to prove by this witness and also by other witnesses called, with your Honor's permission, that the opening in this angle iron or sill or buffer is a better and safer appliance, better protection, greater protection to the men who have occasion to go between the cars than any form of grab-iron or hand-hold that is known in railroad circles.

Mr. DOHERTY: I object to that.

61 The COURT: Objection sustained on the ground that it is a question for the jury.

Mr. GRAVES: To which the defendant excepts.

Cross-examination:

"The grab-iron or hand-hold used on steam railroads is a long piece of metal affixed to the end of the sill projecting downwards so it can be easily grasped by the hands. There is nothing like that on these cars. I have had steam railroad experience. I have had occasion in my railroad experience to use a grab-iron as a life saving device when I was between the cars coupling an air hose when they started. I was stooping down at the time. It was one of the Inland cars and was in the yards at the time. It did not start so very slowly."

Thereupon the defendant rested and the plaintiff rested also.

The foregoing setting forth and containing all the evidence introduced and offered by the parties to the cause, at its conclusion, both having rested, the defendant challenged the sufficiency of the evidence, moved the Court for a non-suit, and that the cause be taken from the jury and the action dismissed upon all of the counts. Defendant further moved the Court that in the event and only in the event that the Court denied the motion to dismiss as to all the counts, to dismiss as to the last three counts of the complaint, those that charged a failure to equip cars with automatic couplers. The Court overruled both motions, and thereupon the defendant asked and was allowed an exception to such ruling. Before the jury

62 were charged, the defendant in writing requested the following instructions:

I.

"The plaintiff herein has not made out a case against defendant on any of the causes of action stated in its complaint, and you will therefore return a verdict in defendant's favor."

"In the event that the Court should refuse to give the above requested instruction No. 1, then the defendant requests the Court to give the following instruction:

I.

You are instructed that the plaintiff has made out no case against defendant as to the first twelve causes of action pleaded in its complaint, and as to those causes of action your verdict must be for defendant."

"In the event that the Court shall refuse to give instruction No. 1 hereinabove requested, instructing the jury to return a verdict in defendant's favor, and not otherwise, the defendant requests the Court to instruct the jury as follows:

I.

An act of Congress requires cars which are used in interstate business to be equipped with couplings which will couple automatically by impact, and to be provided with secure grab-irons or hand-holds in the ends and sides of the cars. The act provides, however, that it shall not apply to cars used in interstate commerce which are used upon street railways. I charge you that under this
63 provision there can be no recovery against defendant for a failure to equip any of its cars which are run over its street railway lines, whether engaged exclusively in handling purely street railway business or not, with the safety appliances enumerated by the act. If you find from the evidence, therefore, that in the operation of its electric railway lines the defendant habitually runs the cars referred to in the several causes of action set up in plaintiff's complaint, or any one of them, over its street railway lines, in order to reach its passenger station, any car so used is exempt from the operation of the act, and you cannot award any recovery against defendant for the failure to equip any car so used with the appliances prescribed by the act."

Counsel for plaintiff and defendant having addressed the jury, the Court instructed the jury as follows:

"Gentlemen of the Jury, section 4 of the safety appliance Act of 1903 provides that "From and after the first day of July, 1905, and until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railway company to use any car in interstate commerce that is not provided with secure grab-irons or hand-holds in the ends and sides of any car, for greater security to men in coupling and uncoupling the cars.'

"Section one of the act amended March 2nd, 1903, provides: 'That the Act shall not apply to cars which are used upon street railways.'

64 "The first question as to whether or not these hand-holds or grab-irons were sufficient presents a question of fact for your consideration.

"The second question, that is, whether the cars were run on a

street railway, presents a question of law for the consideration of the Court, which I will determine hereafter.

"As to the requirements of this Act I charge you as follows: The Act of Congress relative to safety appliances provides that railroad cars 'used in interstate commerce shall be provided with secure grab-irons or hand-holds on the ends and sides of each car for greater safety to men in coupling and uncoupling cars.' It is charged in the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th and 12th causes of action herein that the cars described in and referred to in said causes of action were without grab-irons or hand-holds at the ends of such cars. The purpose of the act is to afford greater security to men coupling or uncoupling cars by reason of the presence of grab-irons or hand-holds, than would be possible if there were nothing of the sort on the ends of the cars. If you should find from the evidence in this case that although there might not have been on the ends of the cars referred to anything which would be known technically as grab-irons or hand-holds, yet if there were upon the ends of such cars an appliance which could be used as a grab-iron or hand-hold and which would afford as much security to men coupling or uncoupling the cars as would be afforded
65 by having what would be technically known as grab-irons or hand-holds on the ends of the cars, then your verdict should be for the defendant.

"The law does not require any particular kind of grab-iron or hand-hold to be placed upon the end of the car, but only requires that some such appliance shall be placed there which will afford the person coupling or uncoupling cars equal security with that which would be obtained by the method I have given.

"Gentlemen, you have heard the testimony in this case and you have examined the hand-holds in question, and it is for you to say from that testimony and from your personal examination of the cars whether the appliance provided by this company complies with the Act of Congress; in other words, whether it affords that safety and protection to employes which the law contemplates and requires.

"The burden is upon the Government to establish its case by a preponderance of the testimony. If, from a preponderance of the testimony offered herein you are satisfied that the defendant has not furnished grab-irons or hand-holds as I have defined these terms to you within the meaning of the law, you will find the defendant guilty on the first twelve counts.

"As to the last three counts, you will find the defendant guilty on each count and this Court will determine what effect shall be given to your conclusion hereafter.

"I charge you as a matter of law that these trains were employed in interstate commerce, inasmuch as they run between the
66 city of Spokane in the state of Washington and Coeur d'Alene City in the state of Idaho."

At the conclusion of the instructions, the defendant excepted to the Court's refusal to instruct the jury to find for the defendant on all the counts, and excepted also to the Court's instructing the jury

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to find the defendant guilty upon the last three counts, 13, 14 and 15, and its exceptions were allowed. The jury thereupon retired to consider their verdict, and thereafter returned into Court a verdict for the plaintiff finding the defendant guilty upon each and every count of the complaint, and awarding against it a verdict of $1,500 on account thereof.

Thereafter, defendant moved the Court to enter judgment in its favor herein dismissing the action and for costs, notwithstanding the verdict returned herein by the jury, for the reason that the verdict is contrary to law and to the undisputed evidence in the case, and that under the law and the facts defendant was entitled to judgment.

Such motion was overruled, and the defendant asked and was allowed an exception thereto.

Thereafter also the defendant duly served and filed its petition for a new trial, which was as follows:

"Defendant prays the Court to grant it a new trial in this action for the following causes:

"First. Insufficiency of the evidence to justify the verdict herein.

67 "The evidence was insufficient to justify the verdict for the reason:

"(*a*) That it appears that the cars referred to in plaintiff's complaint were cars which are used upon a street railway line, and being so used do not come within the operation of the act; also

"(*b*) Because it appears that the hand-hold or grab-iron in the buffer or sill at the ends of such cars were sufficient within the meaning of the act of congress pleaded in the complaint.

"Second. Error in law occurring at the trial and excepted to at the time by defendant. The particular errors relied upon are:

"(*a*) The exclusion of the testimony of skilled and experienced railway men to the effect that the hand-holds or grab-irons in the buffers of the cars described in the complaint were sufficient to accomplish the purpose intended to be accomplished by the provisions of the act, and better than those commonly in use upon cars.

"(*b*) In rejecting its offer to prove the facts last above stated.

"(*c*) In denying defendant's motion for a non-suit.

"(*d*) In denying defendant's motion to instruct the jury to return a verdict in its favor.

"(*e*) In instructing the jury to return a verdict of guilty against defendant on the last three counts in the complaint.

68 This petition is based and will be heard upon the pleadings herein, and the record made during the progress of the trial, and upon all the minutes of the Court."

Which motion for a new trial was, after argument by counsel for and against the motion respectively and after due consideration by the Court, overruled.

And now in furtherance of justice and that right may be done, the defendant tenders and presents the foregoing as its bill of exceptions in this case to the action of the Court, and prays that the same be settled and allowed and signed and sealed by the Court, and made a

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part of the record in this case, and the same is accordingly done this 2nd day of November, 1912.

FRANK H. RUDKIN,
District Judge.

Endorsements: Bill of Exceptions. Filed November 2, 1912. W. H. Hare, Clerk. By Frank C. Nash, Deputy.

In the District Court of the United States, Eastern District of Washington, Northern Division.

UNITED STATES OF AMERICA, Plaintiff,
vs.
SPOKANE & INLAND EMPIRE RAILROAD COMPANY, Defendant.

Stipulation.

It is stipulated that the bill of exceptions heretofore pro-
69 posed by defendant and submitted to plaintiff is correct and may be settled and signed by the trial judge without further delay, the plaintiff having no amendments to propose thereto, and being willing that said bill shall be settled forthwith.

Dated November 1st, 1912.

(Signed) OSCAR CAIN, *Attorney for Plaintiff.*
(Signed) GRAVES, KIZER & GRAVES,
Attorneys for Defendant.

Endorsements: Stipulation. Filed November 2, 1912. W. H. Hare, Clerk. By S. M. Russell, Deputy.

In the District Court of the United States for the Eastern District of Washington, Northern Division.

UNITED STATES OF AMERICA, Plaintiff,
vs.
SPOKANE & INLAND EMPIRE RAILROAD COMPANY, Defendant.

Assignments of Error.

Comes now the above named plaintiff, Spokane & Inland Empire Railroad Company, and in connection with its petition for writ of error makes the following assignments of error which it avers were committed by the Court in the trial of this cause and upon which it will rely in its prosecution of the writ of error in the above entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit.

First. The Court erred in excluding the testimony of
70 skilled and experienced railway men experienced in the switching and handling of cars, and who had examined the cars described in the complaint, relative to the sufficiency of the

hand-holds on the buffers or sills of the cars as a means of protection to the men who might be required to go between the cars in the process of coupling or otherwise handling them.

Second. The Court erred in rejecting defendant's offer to prove by skilled and experienced railway men accustomed to the handling and coupling of cars, and who had examined the cars described in the complaint, that the hand-holds or grab-irons in the buffers or sills of such cars were sufficient to protect men who might be required to go between the cars in coupling or otherwise handling them, that they were sufficient to accomplish purposes intended to be accomplished by the provisions of the safety appliance act requiring hand-holds or grab-irons to be placed upon the end of cars used in interstate commerce, and that they were better than those commonly used upon cars engaged in interstate commerce.

Third. The Court erred in denying defendant's motion for a nonsuit made at the conclusion of all the evidence and that the cause be taken from the jury and the action dismissed upon all the counts.

Fourth. The Court erred in denying defendant's motion to dismiss as to the last three counts of the complaint, those that charged a failure to equip cars with automatic couplers.

71–88 Fifth. The Court erred in refusing to give defendant's requested instruction numbered one, to the effect that the plaintiff had not made out a case against defendant on any of the causes of action stated in its complaint, and that the jury should therefore return a verdict in defendant's favor.

Sixth. The Court erred in instructing the jury to find the defendant guilty upon the last three counts of the complaint, thirteen, fourteen and fifteen, wherein the defendant was charged with a failure to equip cars used in interstate commerce with automatic couplers which would couple by impact.

Seventh. The Court erred in denying defendant's motion for judgment notwithstanding the verdict returned by the jury wherein it moved that the Court enter judgment in defendant's favor dismissing the action, and for costs.

Eighth. The Court erred in denying defendant's petition for a new trial.

Ninth. The Court erred in rendering judgment against defendant.

Wherefore, defendant prays that the aforesaid errors be corrected and the judgment of the District Court reversed, and that said Court be directed to set aside the judgment heretofore entered in plaintiff's favor and enter judgment in defendant's favor, dismissing the action, or if it be deemed that such relief is not grantable, that the cause be remanded for a new trial.

(Signed) GRAZES, KIZER & GRAVES,
Attorneys for Defendants.

* * * * * * *

89 United States Circuit Court of Appeals for the Ninth Circuit.

No. 2258.

SPOKANE & INLAND EMPIRE RAILROAD COMPANY, a Corporation, Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA, Defendant in Error.

[*Opinion U. S. Circuit Court of Appeals.*]

Upon Writ of Error to the United States District Court for the Eastern District of Washington, Northern Division.

Before Gilbert, Ross, and Morrow, Circuit Judges.

Ross, *Circuit Judge:*

The plaintiff in error was at the times here in question a common carrier engaged in interstate commerce by means of an electric railroad between the City of Spokane, in the State of Washington, and Cœur d'Alene City in the State of Idaho, and for alleged violations of the act of Congress known as the Safety Appliance Act, approved March 2, 1893 (27 Stats. 531), as amended April 1, 1896 (29 Stats., 85), and as further amended March 2, 1903 (32 Stats. 1911), the present action was brought by the Government, the complaint in which action contains fifteen counts, the first twelve of which allege in substance that the violation of the statute consisted in hauling over its road certain designated cars which were not provided with the grab-irons or hand-holds required by the
90 statute, and the last three of which alleged in substance the violation of the statute to have consisted in hauling over its road certain designated cars not provided with the automatic couplers thereby required.

The case was tried with a jury, which returned a verdict against the railroad company upon which judgment was given against it, resulting in the present writ of error in its behalf.

It is first urged that the cars in question do not come within the provisions of the Safety Appliance Act, and, second, that the trial court erred in refusing to permit the railroad company to introduce certain testimony, and in its instruction to the jury.

The first point thus urged is based upon the exception contained in Section 1 of the Act of March 2, 1903, excepting from the operation thereof cars "which are used upon street railways." The section reads as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions and requirements of the Act entitled 'An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with

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driving-wheel brakes, and for other purposes,' approved March second, eighteen hundred and ninety-three, and amended April first, eighteen hundred and ninety-six, shall be held to apply to common carriers by railroads in the Territories and the District of Columbia and shall apply in all cases, whether or not the couplers brought together are of the same kind, make, or type; and the provisions and requirements hereof and of said Acts relating to train brakes, automatic couplers, grab irons, and the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the Territories and the District of Columbia, and to all other locomotives, tenders, cars and similar vehicles used in connection therewith, excepting those trains, cars, and locomotives exempted by the provisions of section
91 six of said Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six, or which are used upon street railways."

These, among other, facts appear from the undisputed evidence: In addition to its interurban lines, one of which extends from Spokane to Cœur d'Alene, a distance of about forty miles, the plaintiff in error owns the street railway system in Spokane. The interurban line extending to Cœur d'Alene is of standard gauge and of standard weight of rails. The superintendent of that system testified, among other things, as follows:

"My superintendency is over the interurban lines. I do not control the street railway lines. On the interurban lines tickets are sold for particular stations the same as a railroad. We handle baggage for our passengers. Our trains are made up according to standard railroad rules, with markers to designate the trains, and are run on schedules and by train orders. The employees who are engaged in the street car service do not have anything to do with the operation of the interurban service. They use the same tracks, however, that come from the freight depot to the passenger terminal in the heart of the city. We do not take passengers on the interurban trains within the city limits exclusively. We receive passengers at points within the city limits for transportation outside, and drop passengers on interurban trains at various points within the city, but within the city limits we do no strictly streetcar business."

The trains of the company in which were the cars here in question leave its passenger depot near the center of Spokane, and go out over the *the* tracks of the company's street railroad system for a little over a mile to the yards of the company, where they take the direct line to Cœur d'Alene, which is on the company's private right of way. Those of the cars in question which are mentioned in the first twelve counts of the complaint are large passenger coaches having no grab-irons or hand-holds on the ends of the cars; instead, on their ends there is a radial coupler and a heavy steel sill or buffer,
92 round on the corners, in which buffer or sill, on the passenger coaches, there are, on each side of the coupler, openings measuring from 18 to 22 inches in length, and from 2¼ to 3 inches of clearance, but on the baggage and mail cars the sill or buffer is solid.

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The three cars mentioned in the last three counts of the complaint, and which it appears were brought into the interurban service because of a pressure of traffic, were street railway cars which not only had no automatic couplers thereon, but, because of their small size, were incapable of having them.

There is testimony to the effect—and none to the contrary—that the sharpness of the curves on the streetcar line is such as to make it impossible to run cars over that line having grab-irons or handholds on the end of the cars. Conceding that to be true, it is no answer to the Government's action if the Act of Congress in question is applicable to the company's interurban lines. To hold with the plaintiff in error on this point would be to hold that, because the company uses the tracks of its streetcar lines for a mere trifle of the distance between its terminal points in order to reach the center of the city of Spokane, its entire interurban line, which has all of the characteristics in build and operation of a standard steam road, is not subject to the Safety Appliance Act. That would indeed be a case of "the tail wagging the dog."

We are of the opinion that the Act of Congress does not admit of such an interpretation, especially in view of the manifest purpose of the legislation. The exception from its operation of cars "used upon street railways" we think means, if not those solely used on street railways, at least such as are used on such railways in street railway traffic, which was not the case here, according to the testimony of the company's own witnesses.

In Moore, et al. vs. American Transportation Company, 24 How. 1, the Supreme Court, in speaking of that provision of the Act of March 3, 1851, entitled "An Act to Limit the Liability of 93 Ship Owners, and for other purposes," which declared "This Act shall not apply to the owner or owners of any canal boat, barge, or lighter, or to any vessel of any description whatsoever used in rivers or inland navigation," said:

"This word used means, in the connection found, employed, and doubtless in the mind of Congress was intended to refer to vessels solely employed in river or inland navigation."

The use of such interurban cars as we have here, engaged as they are in interstate commerce, for a comparatively short and relatively inconsiderable distance on a street railway in order to reach the city terminus of the company and handling no streetcar business, can hardly be considered an intermingling of traffic; but if so it would, in our opinion, no more make inapplicable the Safety Appliance Act to the interurban line than does the intermingling of intrastate with interstate traffic defeat the power of Congress over the latter. See Baltimore & Ohio Railroad Company vs. Interstate Commerce Commission, 221 U. S. 612; Southern Railway Company vs. The United States, 222 U. S. 20.

We also regard as tending to support our conclusion in this respect the decision of the Supreme Court in the case of United States vs. Atchison, Topeka & Santa Fe Railway Company, 220 U. S. 37, where that court had under consideration that provision of the Act of March 4, 1907 (34 Stats. 1415, 1416), making it unlawful for

common carriers subject to the act to permit any employee subject thereto to be on duty for a longer period than sixteen consecutive hours, or after that period to go on duty again until he has had at least ten consecutive hours off duty, or eight hours after sixteen hours' work in the aggregate, with certain exceptions not necessary to be mentioned, in which case the Court said:

"A trifling interruption would not be considered, and it is possible that even three hours by night and three hours by day would not exclude the office from all operation of the law, and to that extent defeat what we believe was its intent."

94 The rulings and instructions of the court below remain to be considered. During the trial the witness Robertson testified, among other things, that he had been employed for 23 years as brakeman, switchman, yard-master, and conductor, and had had a great deal of experience in coupling and uncoupling cars and was familiar with the types of hand-holds ordinarily provided on steam railroads for the security of men going between the cars, and that generally there is uniformity in such appliances and the place of their location; that "where there is a hand-hold on passenger coaches on steam roads, it is about midway from the bottom of the wooden sill to the bottom of the car above the track. The hand-holds that are used on steam railroads are about the height of my shoulder above the track. I am 5 feet 10 or 11 inches, and the hand-hold would strike me just about the shoulder. I have examined the passenger coaches on the Spokane & Inland Empire Railroad Company with reference to the openings which it claims is a hand-hold in the buffer or sill of their cars."

The record proceeds:

"Thereupon counsel for defendant asked the witness then on the stand this question:

"'What would you say of them as a safe and proper appliance; one that would tend to preserve men from injury who might have to go between the cars for any purpose,'

"Plaintiff's counsel thereupon objected to the question, stating that 'the question is, is it a hand-hold.' The Court sustained the objection 'on the ground that it invades the province of the jury'; that defendant was seeking to prove by the witness the very question that the jury were to decide. Counsel for defendant thereupon made the following offer of proof:

"'Now, if your Honor pleases, I offer to prove by the witness on the stand, and I will call other witnesses, and particularly experienced railroad men, of years of experience, to prove by him and

95 by them, by questions and answers addressed to them, that the opening in the beam or buffer of these electric cars is intended to subserve and does subserve the same purpose as the round iron appliance that is prescribed by the rules of the Interstate Commerce Commission at the present time and is in use on steam railroads, that it is a better appliance than these are for the purpose of protecting men from injury who have to go between the cars. I offer to prove that and to ask questions of this witness to that effect.'

"Thereupon counsel for plaintiff objected to the offer, and the

Court sustained the objection upon the ground that it was not a question for expert testimony, but was a matter of common knowledge," to which ruling the defendant excepted.

Another witness, Arlington Mahan, who was general foreman in the shops of the plaintiff in error, testified among other things as follows:

"I am familiar with the passenger coaches of that company that have a buffer at the end and an opening in it. I was in the employ of the company at the time these cars or some of them were purchased. The openings were in the beam or sill when the cars were received. There were hand-holds up and down on the sides of the cars when they were received. There were none on the ends of the cars in the place where they are put on steam cars. I know of no reason for the openings on top of the angle iron on that beam. The men use them for grab-irons whenever they have occasion to couple or uncouple cars, or go between them. I have had occasion to couple and uncouple cars in that yard and other yards."

The record proceeds:

"Thereupon counsel for defendant asked the following question:

" 'Does that opening in the top of the sill serve the same purpose and is it as well fitted for the purpose of protecting the lives and limbs of men who have occasion to go between the cars in the exercise of their duties as the form of grab-irons that is used on steam cars, that is brought below the end of the car.'

96 "Counsel for plaintiff objected to the question, and the Court sustained the objection on the following grounds:

" 'I am of the opinion that this is one of the cases where witnesses must state facts and not conclusions, whether that is a reasonably safe appliance is within the knowledge of the ordinary man and no special experience is required.'

"Thereupon defendant asked and was allowed an exception to the ruling. The witness further testified:

" 'I am familiar with the form of grab-iron or hand-hold that is used on the passenger cars of steam railroads. It is attached to the end of the car, one on each corner, and projects downward. The Interstate Commerce Commission requires that they shall have a clearance of at least two inches, preferably two and a half, below the car sill. The handle runs *fifferent* lengths. The Interstate Commerce Commission requires that it shall be not less than 16 inches inside clearance. There is one of these on each side of the draw bar. The opening in the angle iron in that buffer on the Spokane & Inland Empire cars runs in length from 16 to 24 inches. It is from 2½ to 2¾ inches wide, and there is one of such openings on each side of the draw-bar on both ends of the car, making four in all. It would be impossible to put on the passenger cars of the defendant such grab-irons as are in use on the cars of steam railroads because in going around the curves on the city streets the coupler would strike a brake.'

"And thereupon the following question was asked and the following matters occurred:

" 'In your opinion, Mr. Mahan, and observation of these cars, is

the opening in the angle bar a better and safer appliance for the safety of persons having occasion to go between the cars in the discharge of their duties than those that are used upon steam railroads?'

"Mr. DOHERTY: The question is objected to.

"The COURT: I will sustain the objection.

"Mr. GRAVES: To which we take an exception.

97 "Mr. GRAVES: I now offer to prove by this witness and also by other witnesses called, with your Honor's permission, that the opening in this angle iron or sill or buffer is a better and safer appliance, better protection, greater protection to the men who have occasion to go between the cars than any form of grab-iron or hand-hold that is known in railroad circles.

"Mr. DOHERTY: I object to that.

"The COURT: Objection sustained on the ground that it is a question for the jury.

"Mr. GRAVES: To which the defendant excepts."

In its instructions to the jury regarding this matter, the court told them that the Act of Congress relative to safety appliances provided that railroad cars "used in interstate commerce shall be provided with secure grab-irons or hand-holds on the ends and sides of each car for greater safety to men in coupling and uncoupling cars," and instructed them as follows:

"The purpose of the act is to afford greater security to men coupling or uncoupling cars by reason of the presence of grab-irons or hand-holds, than would be possible if there were nothing of the sort on the ends of the cars. If you should find from the evidence in this case that although there might not have been on the ends of the cars referred to anything which would be known technically as grab-irons or hand-holds, yet if there were upon the ends of such cars an appliance which could be used as a grab-iron or hand-hold and which would afford as much security to men coupling or uncoupling the cars as would be afforded by having what would be technically known as grab-irons or hand-holds on the ends of the cars, then your verdict should be for the defendant. The law does not require any particular kind of grab-iron or hand-hold to be placed upon the end of the car, but only requires that some such appliance shall be placed there which will afford the person coupling or uncoupling cars equal security with that which would be obtained by the method I have given. Gentlemen, you have heard the testimony in this case

98 and you have examined the hand-holds in question, and it is for you to say from that testimony and from your personal examination of the cars whether the appliance provided by this company complies with the Act of Congress; in other words, whether it affords that safety and protection to employees which the law contemplates and requires. The burden is upon the Government to establish its case by a preponderance of the testimony. If, from a preponderance of the testimony offered herein you are satisfied that the defendant has not furnished grab-irons or hand-holds as I have defined these terms to you within the meaning of the law, you will find the defendant guilty on the first twelve counts."

We are of the opinion that the plaintiff in error has no valid

ground of objection to these instructions, and agree with the trial judge that the question as to whether the openings in the buffer on the ends of the cars afforded the security intended by the Act of Congress was not the subject of expert testimony, and that the personal inspection of such openings by sensible jurors was a safer guide to the truth in regard to the matter than the mere opinion of witnesses.

The judgment is affirmed.

(Endorsed:) Opinion. Filed Jan. 5, 1914. (Signed) F. D. Monckton, Clerk.

99 United States Circuit Court of Appeals for the Ninth Circuit.

No. 2258.

SPOKANE & INLAND EMPIRE RAILROAD COMPANY, a Corporation, Plaintiff in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

Judgment, U. S. Circuit Court of Appeals.

In Error to the District Court of the United States for the Eastern District of Washington, Northern Division.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Eastern District of Washington, Northern Division, and was duly submitted:

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed:) Judgment, U. S. Circuit Court of Appeals. Filed and Entered January 5, 1914. (Signed) F. D. Monckton, Clerk.

100 In the United States Circuit Court of Appeals for the Ninth Circuit.

SPOKANE & INLAND EMPIRE RAILROAD COMPANY, a Corporation, Plaintiff in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

Petition for Writ of Error.

Your petitioner, the Spokane & Inland Empire Railroad Company, plaintiff in error in the above entitled cause, respectfully shows that the above entitled cause is now pending in the United States Circuit Court of Appeals for the Ninth Circuit and that a judgment has therein been rendered on January 5, 1914, affirming a judgment

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of the District Court of the United States, for the Eastern District of Washington, Northern Division, and that the matter in controversy in the action exceeds One Thousand ($1,000) Dollars, besides costs, and that the jurisdiction of none of the courts above mentioned is or was dependent in anywise upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different states, and the cause does not arise under the patent laws, under the copyright laws, under the revenue laws, or under the criminal laws, and it is not an admiralty case, and it is therefore a proper case to be reviewed by the Supreme Court of the United States upon writ of error.

Therefore, your petitioner respectfully prays that a writ of error be allowed it in the above entitled cause directing the clerk of the United States Circuit Court of Appeals for the Ninth Circuit to send the records and proceedings in said cause with all things concerning the same, to the Supreme Court of the United States in order
101 that the errors complained of in the assignments of error herewith filed by said plaintiff in error may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

SPOKANE & INLAND EMPIRE RAILROAD COMPANY,
(Signed) By GRAVES, KIZER & GRAVES,
(Signed) W. G. GRAVES, *Its Attorneys.*

The foregoing petition is granted and writ of error allowed as prayed upon plaintiff's giving bond according to law in the sum of three thousand dollars, same to operate as a supersedeas.

(Signed) WM. B. GILBERT,
Circuit Judge.

(Endorsed:) No. 2258. In the United States Circuit Court of Appeals for the Ninth Circuit. Spokane & Inland Empire Railroad Company, a Corporation, Plaintiff in Error, vs. United States of America, Defendant in Error. Petition for allowance of writ of error returnable in Supreme Court U. S. and order granting petition. Filed Feb. 4, 1914. (Signed) F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

102 In the United States Circuit Court of Appeals for the Ninth Circuit.

SPOKANE & INLAND EMPIRE RAILROAD COMPANY, a Corporation, Plaintiff in Error,
vs.
UNITED STATES OF AMERICA, Defendant in Error.

Assignments of Error.

Plaintiff in error, Spokane & Inland Empire Railroad Company, says that in the record and proceedings aforesaid of the United States

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Circuit Court of Appeals for the Ninth Circuit in the above entitled cause and in the rendition of the final judgment therein, manifest error has intervened to the prejudice of the plaintiff in error in this, to-wit:

First. The said Circuit Court of Appeals erred in rendering judgment affirming the judgment of the District Court of the United States, for the Eastern District of Washington, Northern Division, which judgment was rendered on November 2, 1912, and was in favor of the defendant in error, United States of America, and against the plaintiff in Error, Spokane & Inland Empire Railroad Company, in the sum of Fifteen Hundred ($1,500) Dollars, besides costs and disbursements taxed therein.

Second. Said Circuit Court of Appeals erred in not reversing said judgment aforesaid and in not *com*manding the said cause to the said District Court with directions to enter judgment in favor of the plaintiff in error notwithstanding the verdict of the jury, or if it should appear that judgment ought not to be entered in favor of plaintiff in error notwithstanding the verdict of the jury, in
103 not remanding the cause to the said District Court for a new trial.

Third. Said Circuit Court of Appeals erred in not sustaining the first specification of error relied upon by plaintiff in error as cause for reversal of the judgment of the said District Court, which specification of error was that the District Court erred in sustaining the objection to the question asked the witness Robertson with respect to the openings in the buffers or sills of the cars referred to in the first twelve counts of the complaint, which are claimed by plaintiff in erorr to be handholds, viz.:

"What would you say of them as a safe and proper appliance, one that would tend to preserve men from injury who might have to go between the cars for any purpose?"

Fourth: Said Circuit Court of Appeals erred in not sustaining the second specification of error relied upon by plaintiff in error as cause for reversal of the judgment of the said District Court, which specification of error was that the District Court erred in rejecting the following offer of proof:

"Now, if your honor pleases, I offer to prove by the witness on the stand, and I will call other witnesses, and particularly experienced railroad men, of years of experience, to prove by him and by them, by questions and answers addressed to them, that the opening in the beam or buffer of these electric cars is intended to subserve the same purpose, and does subserve the same purpose, as the round iron appliance that is prescribed by the rules of the Interstate Commerce Commission at the present time and is in use on steam railroads, that it is a better appliance than these are for the purpose of *por*tecting men from injury who have to go between the cars. I offer to prove that and to ask questions of this witness to that effect."

Fifth. Said Circuit Court of Appeals erred in not sustaining the third specification of error relied upon by plaintiff in error as cause for reversal of the judgment of the said District Court, which specification of error was that the District Court erred in sustaining the

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objection to the question asked the witness Mahan with respect to the openings in the sills of the cars, to-wit:

"Does that opening in the top of the sill serve the same purpose and is it as well fitted for the purpose of protecting the lives and limbs of men who have occasion to go between the cars in
104 the exercise of their duties as the form of grab-iron that is used on steam cars, that is brought below the end of the car?"

Sixth. Said Circuit Court of Appeals erred in not sustaining the fourth specification of error relied upon by plaintiff in error as cause for reversal of the judgment of the said District Court, which specification of error was that the District Court erred in sustaining plaintiff in error's objection to the question asked the witness Mahan with respect to the openings in the sills of the cars:

"In your opinion, Mr. Mahan, and observation of these cars, is the opening in the angle bar a better and safer appliance for the safety of persons having occasion to go between the cars in the discharge of their duties than those that are used upon steam railroads?"

Seventh. Said Circuit Court of Appeals erred in not sustaining the fifth specification of error relied upon by plaintiff in error as cause for reversal of the judgment of the said District Court, which specification of error was that the District Court erred in rejecting plaintiff in error's offer to prove, during the examination of the witness Mahan, as follows:

"I now offer to prove by this witness, and also by other witnesses called, with your Honor's permission, that the opening in this angle iron or sill or buffer is a better and safer appliance, better protection, greater protection to the men who have occasion to go between the cars than any form of grab iron or handhold that is known in railroad circles."

Eighth. Said Circuit Court of Appeals erred in not sustaining the sixth specification of error relied upon by plaintiff in error as cause for reversal of the judgment of the said District Court, which specification of error was that the District Court erred in denying plaintiff in error's challenge to the sufficiency of the evidence at the close of all the evidence, and in denying its motion for a nonsuit, and that the cause be taken from the jury and the action dismissed upon all of the counts.

Ninth. Said Circuit Court of Appeals erred in not sustaining the seventh specification of error relied upon by plaintiff in error as cause of reversal of the judgment of the said District Court, which
105 specification of error was that the District Court erred in denying plaintiff in error's motion that in the event, and only in the event, that the court denied the motion to dismiss as to all the counts, that it dismiss as to the last three counts of the complaint, those that charged a failure to equip cars with automatic couplers.

Tenth. Said Circuit Court of Appeals erred in not sustaining the eighth specification of error relied upon by plaintiff in error as cause of reversal of the judgment of the said District Court, which specification of error was that the District Court erred in refusing defendant's request to instruct the jury as follows:

TO CLOSE IN CENTER

"The plaintiff herein has not made out a case against defendant on any of the causes of action stated in its complaint, and you will therefore return a verdict in defendant's favor."

Eleventh. Said Circuit Court of Appeals erred in not sustaining the ninth specification of error relied upon by plaintiff in error as cause of reversal of the judgment of the said District Court, which specification of error was that the District Court erred in denying plaintiff in error's motion to enter judgment in its favor dismissing the action and for costs notwithstanding the verdict returned by the jury, for the reason that the verdict is contrary to law and to the undisputed evidence in the case, and that under the law and the facts plaintiff in error was entitled to judgment.

Twelfth. The said Circuit Court of Appeals erred in not sustaining the tenth specification of error relied upon by plaintiff in error as cause of reversal of the judgment of the said District Court, which specification of error was that the District Court erred in denying plaintiff in error's petition for a new trial for the reasons and on account of the matters set forth in such petition.

Thirteenth. Said Circuit Court of Appeals erred in not sustaining the eleventh specification of error relied upon by plaintiff in error as cause of reversal of the judgment of the said District Court, which specification of error was that the District Court erred in
106 entering judgment upon the verdict against plaintiff in error.

Wherefore, said Spokane & Inland Empire Railroad Company, plaintiff in error, prays that for the errors aforesaid and other errors appearing in the record of said United States Circuit Court of Apppeals in the above entitled cause to the prejudice of the plaintiff in error, that the said judgment of the said United States Circuit Court of Appeals be reversed, annualled and for naught held and that said cause be remanded to the United States District Court for the Eastern District of Washington, Northern Division, with instructions to enter judgment in favor of plaintiff in error; that the defendant in error take nothing by its said action; that plaintiff in error go hence without day and recover its costs, or if for any cause it shall be deemed that such relief is not grantable, that the cause be so remanded with instructions to grant a new trial, and for such further proceedings therein as may be determined upon by this honorable court to the end that justice may be done in the premises.

[Signed] GRAVES, KIZER & GRAVES,
[Signed] W. G. GRAVES,
Attorneys for Plaintiff in Error.

[Endorsed:] No. 2258. In the United States Circuit Court of Appeals for the Ninth Circuit. Spokane & Inland Empire Railroad Company, a Corporation, Plaintiff in Error, vs. United States of America, Defendant in Error. Assignments of Error on Return to Writ of Error from Supreme Court U. S. Filed Feb. 4, 1914. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

COPY BOUND TO

107 In the United States Circuit Court of Appeals for the Ninth Circuit.

SPOKANE & INLAND EMPIRE RAILROAD COMPANY, a Corporation, Plaintiff in Error,
vs.
UNITED STATES OF AMERICA, Defendant in Error.

Bond.

Know all men by these presents, that we, Spokane & Inland Empire Railroad Company, a corporation, as principal, and American Surety Company of New York, a corporation, as surety, are held and firmly bound unto the United States of America in the full and just sum of Three thousand Dollars, to be paid to the said United States of America, to which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 17th day of February, A. D. 1914.

Whereas, lately at a term of the United States Circuit Court of Appeals for the Ninth Circuit, in a suit pending in said court between Spokane & Inland Empire Railroad Company, plaintiff in error, and United States of American, defendant in error, a judgment was rendered against the said plaintiff in error, and the said plaintiff in error having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said defendant in error citing and admonishing it to be and appear at a session of the Supreme Court of the United States to be holden at the City of Washington,
108 on the 12th day of October, next.

Now, the condition of the above obligation is such that if the said Spokane & Inland Empire Railroad Company shall prosecute said writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be null, else to remain in full force and virtue.

[SEAL.] SPOKANE & INLAND EMPIRE RAILROAD COMPANY,
[Signed] By WARD G. PAINE, *Vice-President.*

Attest:
[Signed] C. J. DROIDSOR, *Secretary.*

[SEAL.] AMERICAN SURETY COMPANY OF NEW YORK,
[Signed] By F. E. BRISHINE,
Assistant Vice-President.

Attest:
[Signed] B. H. KIZER,
Resident Assistant Secretary.

D CLOSE IN CENTER

The foregoing bond approved and to operate as a supersedeas this 24th day of February, 1914.

[Signed] WM. B. GILBERT,
Circuit Judge.

109 & 110 [Endorsed:] No. 2258. In the United States Circuit Court of Appeals for the Ninth Circuit. Spokane & Inland Empire Railroad Company, a Corporation, Plaintiff in Error, vs. United States of America, Defendant in Error. Bond on Return to Writ of Error from Supreme Court U. S. Filed Feb. 24, 1914. [Signed] F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

* * * * * * *

111 In the Supreme Court of the United States.

SPOKANE & INLAND EMPIRE RAILROAD COMPANY, a Corporation, Plaintiff in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals before you, or some of you, between Spokane & Inland Empire Railroad Company, plaintiff in error, and United States of America, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within sixty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and
112 according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the

United States, the 17th day of March, in the year of our Lord one thousand nine hundred and fourteen.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Allowed by

WM. B. GILBERT,
Circuit Judge for the United States Circuit Court of Appeals, Ninth Circuit.

113 *Return to Writ of Error.*

The answer of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit to the within Writ of Error:

As within we are commanded, we certify under the Seal of our said Circuit Court of Appeals, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the Supreme Court of the United States, within mentioned, at the day and place within contained.

By the Court:

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

[Endorsed:] In the Supreme Court of the United States. Spokane & Inland Empire Railroad Company, a corporation, Plaintiff in Error, vs. United States of America, Defendant in Error. Writ of Error. Docketed. Filed Apr. 2, 1914. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit. Graves, Kizer & Graves, Spokane, Washington, Attorneys for Plaintiff in Error. Due and timely service of the within writ of error by the receipt of a true and correct copy thereof duly attested by F. D. Monckton, Clerk of the United States Circuit Court of Appeals for the 9th Circuit admitted this 26th day of March, 1914. Francis A. Garrecht, United States District Attorney for the Eastern District of Washington, Northern Division.

114 In the United States Circuit Court of Appeals for the Ninth Circuit.

SPOKANE & INLAND EMPIRE RAILROAD COMPANY, a Corporation, Plaintiff in Error,
vs.
UNITED STATES OF AMERICA, Defendant in Error.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the United States of America, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States to be holden at Washington within sixty days from the date hereof, pursuant to writ of error filed in the clerk's office of the United States Circuit Court of Appeals for the Ninth Circuit, wherein Spokane & Inland Empire Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William B. Gilbert, United States Circuit Judge, this 20th day of March, in the year of our Lord, Nineteen Hundred and fourteen.

WM. B. GILBERT,
Circuit Judge for the United States Circuit Court of Appeals, Ninth Circuit.

115 [Endorsed:] Docketed. No. 2258. In the United States Circuit Court of Appeals, for the Ninth Circuit. Spokane & Inland Empire Railroad Company, a corporation, Plaintiff in Error, vs. United States of America, Defendant in Error. Citation. Filed Apr. 2, 1914. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit. Graves, Kizer & Graves, Spokane, Washington, Attorneys for Plaintiff in Error. Due and timely service of the within Citation by the receipt of a true and correct copy thereof duly attested by F. D. Monckton, Clerk of the United States Circuit Court of Appeals for the 9th Circuit is hereby admitted this 26th day of March, 1914. Francis A. Garrecht, United States District Attorney for the Eastern District of Washington, Northern Division.

116 In the Supreme Court of the United States of America.

SPOKANE & INLAND EMPIRE RAILROAD COMPANY, Plaintiff in Error,
vs.
UNITED STATES OF AMERICA, Defendant in Error.

Statement of Errors and of the Parts of the Record Necessary for the Consideration Thereof, in Compliance with Paragraph 9 of Rule 10 of the Rules of the Supreme Court.

The plaintiff in error hereby states that it intends to rely in the Supreme Court upon the errors hereinafter designated, and that it deems the portions of the record hereinafter designated necessary for the consideration of such errors, that is to say:

Statement of Errors.

1. That the trial court erred in excluding the testimony of experienced railway men who had examined the cars, the appliances of which were claimed to be in violation of the safety appliance act, to the effect that the handholds on the buffers or sills of the cars were adequate and sufficient handholds and were designed to and did serve all the purposes of the handholds required by the safety appliance act.

2. The trial court erred in rejecting defendant's offer to prove by experienced railroad men accustomed to the handling and coupling of cars who had examined the cars, the appliances of which were alleged to be in violation of the safety appliance act, to the effect that the handholds on the buffers or sills of such cars were sufficient to protect men who might be required to go between the cars
117 in coupling or otherwise handling them, and that they were sufficient for and answered all the purposes of any handhold or grab-iron which could be devised.

3. That the trial court erred in denying defendant's motion for a non-suit at the conclusion of all the evidence.

4. That the trial court erred in denying defendant's motion to dismiss as to the last three counts of the complaint.

5. That the trial court erred in instructing the jury to find the defendant guilty upon the last three counts of the complaint wherein the defendant was charged with a failure to equip cars used in interstate commerce with automatic couplers.

6. That the trial court erred in denying defendant's motion for judgment notwithstanding the verdict returned by the jury.

7. That the trial court erred in denying defendant's petition for a new trial.

8. That the United States Circuit Court of Appeals for the Ninth Circuit erred in affirming the judgment of the trial court.

Designation of Record to be Printed.

1. The complaint which was filed in the trial court found upon pages 2 to 17 inclusive of the printed transcript of record sent up from the United States Circuit Court of Appeals.
2. The answer, found upon pages 17 to 25 inclusive, of such printed transcript.
3. The reply, found on page 26 of such printed transcript.
4. The verdict, found upon page 27 of such transcript.
5. Defendant's motion for judgment, found upon pages 27 and 28 inclusive of such transcript.
6. Defendant's petition for a new trial, found upon pages 34 to 35 inclusive of such transcript.

118 7. The bill of exceptions, found upon pages 45 to 68 inclusive of such transcript.

8. The assignments of error on error from the United States Circuit Court of Appeals for the Ninth Circuit to the District Court of the United States for the Eastern District of Washington, found on pages 69 to 71 inclusive of such transcript.
9. The opinion of the United States Circuit Court of Appeals affirming the judgment of the trial court, found upon pages 89 to 98 inclusive, of the transcript of record.
10. The petition for writ of error, found upon pages 100 and 101 of the transcript of record.
11. The assignments of error, found upon pages 102 to 106 inclusive of the transcript of record.
12. The bond on error, found upon pages 107 and 108 inclusive of the transcript of record.
13. The writ of error, found upon pages 111 and 112 inclusive of the transcript of record.
14. The return of the Circuit Court of Appeals to the writ of error, found upon page 113 of the transcript of record.
15. The citation, found upon page 114 of the transcript of record.

R. W. NUZUM,
GRAVES, KIZER & GRAVES,
Attorneys for Plaintiff in Error.

119 STATE OF WASHINGTON,
County of Spokane, ss:

I, Edwin C. Matthias, being first duly sworn, on oath depose and say: That I am, and was on the dates hereinafter mentioned, a citizen of the United States and of the State of Washington, over the age of twenty-one years and competent to be a witness in the within entitled action, not being the plaintiff therein; that I served the within Statement of Errors and of the parts of the record necessary for the consideration thereof, in compliance with paragraph 9 of rule 10 of the Rules of the Supreme Court, on F. A. Garrecht, United States District Attorney for the Eastern District of Washington, Northern Division, by delivering to and leaving with said F. A.

COPY BOUND TO

Garrecht at his office in the Federal Building, City of Spokane, State of Washington, a true and correct copy thereof, on the 11th day of April, 1914.

EDWIN C. MATTHIAS.

Subscribed and sworn to before me this 11th day of April, A. D. 1914.

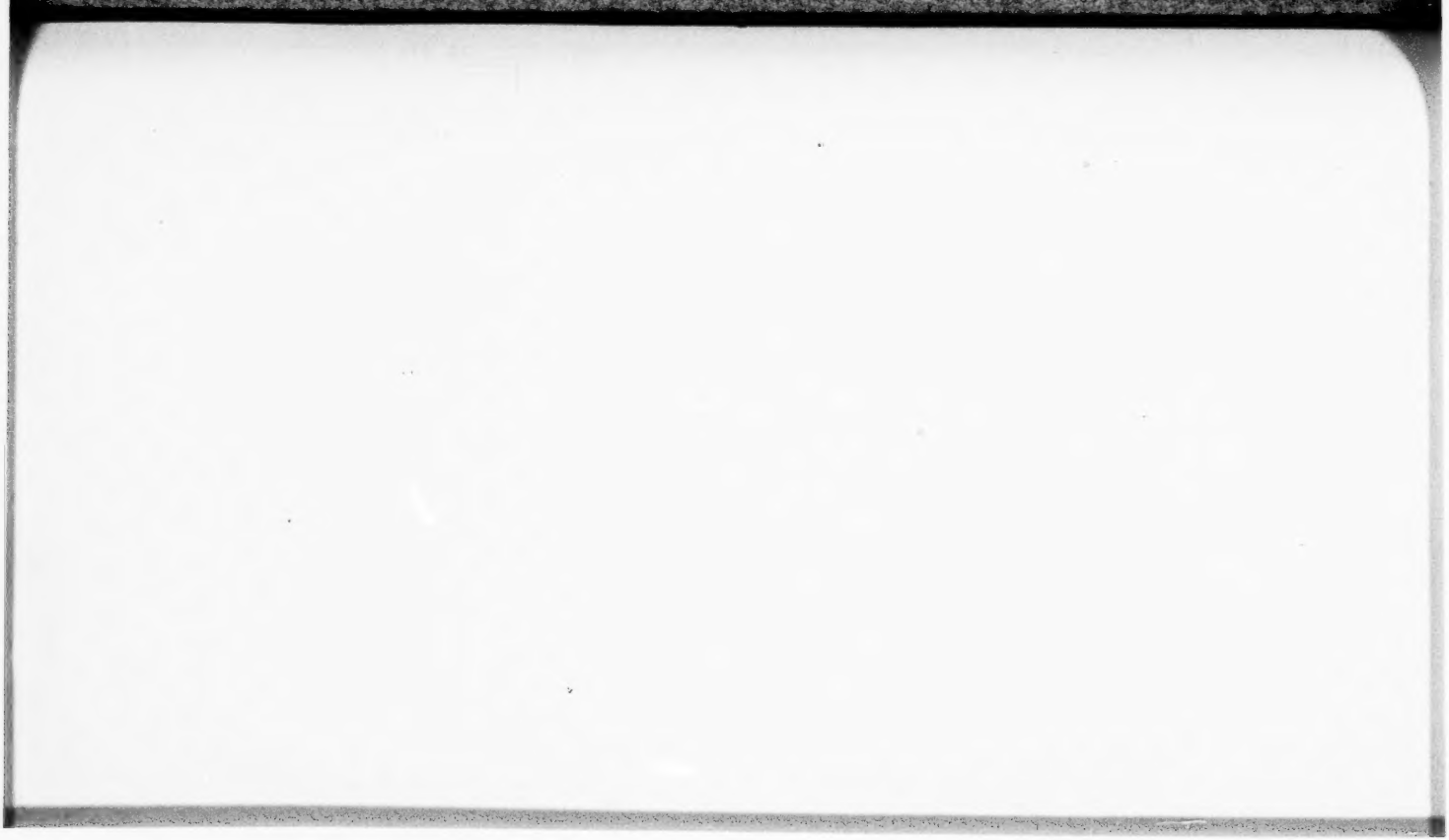
[Seal A. C. Westin, Notary Public, State of Washington. Commission Expires Nov. 3, 1917.]

A. C. WESTIN,
Notary Public in and for the State of Washington, Residing at Spokane.

120 [Endorsed] 1035/24186. In the Supreme Court of the United States of America. Spokane & Inland Empire Railroad Company, Plaintiff in Error, vs. United States of America, Defendant in Error. Statement of Errors and of the Parts of the Record Necessary for the Consideration Thereof. Graves, Kizer & Graves, Spokane, Washington, Attorneys for Plaintiff in Error.

121 [Endorsed:] File No. 24,186. Supreme Court U. S., October Term, 1913. Term No. 1035. Spokane & Inland Empire R. R. Co., Pl'ff in Error, vs. The United States. Statement of errors relied upon and designation by plaintiff in error of parts of record to be printed, and proof of service of same. Filed April 29, 1914.

Endorsed on cover: File No. 24,186. U. S. Circuit Court Appeals, 9th Circuit. Term No. 136. Spokane & Inland Empire Railroad Company, plaintiff in error, vs. The United States. Filed April 27th, 1914. File No. 24,186.



NOV 8 1915

IN THE

SUPREME COURT

OF THE

United States

October Term, 1915

No. 126

SPOKANE & INLAND EMPIRE RAILROAD COMPANY,
Plaintiff in Error,

vs.

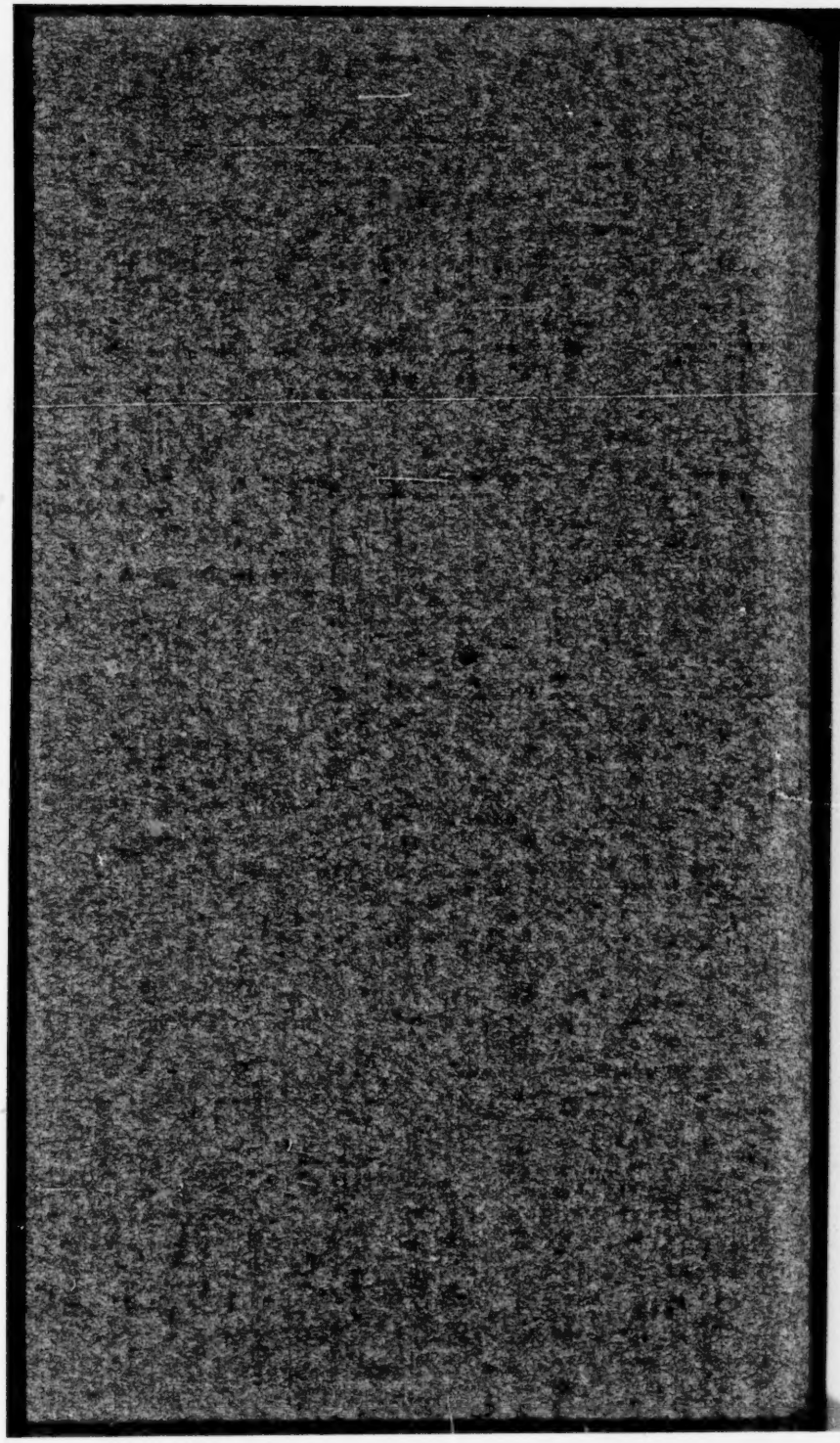
THE UNITED STATES,
Defendant in Error.

In Error to the United States Circuit Court of Appeals for the Ninth Circuit

BRIEF FOR PLAINTIFF IN ERROR

WILL G. GRAVES,
Attorney for Plaintiff in Error.

F. H. GRAVES,
B. H. KIZER,
Of Counsel.



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IN THE

SUPREME COURT

OF THE

United States

October Term, 1915

No. 136

SPOKANE & INLAND EMPIRE RAILROAD COMPANY, Plaintiff in Error,

vs.

THE UNITED STATES, Defendant in Error.

In Error to the United States Circuit Court of Appeals For the Ninth Circuit

BRIEF FOR PLAINTIFF IN ERROR

STATEMENT OF THE CASE.

In a suit to recover penalties under the Safety Appliance Act the jury returned a verdict against

the Railroad Company, its motion for judgment *non obstante* was denied by the District Court, *United States v. Spokane & I. E. R. Co.*, 206 Fed., 988, and its motion for a new trial was likewise denied. The Circuit Court of Appeals affirmed the judgment entered upon the jury's verdict, *Spokane & I. E. R. Co. v. United States*, 210 Fed., 243, and the case is here upon a writ of error sued out by the Railroad Company.

Two questions are presented:

First. Are the provisions of the Safety Appliance Act applicable to cars which are used, though not exclusively, upon a street railway?

Second. Is the testimony of expert witnesses admissible upon the question whether safety appliances are sufficient and afford proper protection to employes working about cars?

Those questions are presented thus:

The Railroad Company owns a street railway system in Spokane, Washington, and several electric railway lines, operating on private right of way, extending from Spokane to points in Idaho. On October 23, 1911, it coupled three of its street

cars together as a train and ran it over the street railway lines and thence from Spokane to a point in Idaho and return, carrying passengers. It is undisputed that those cars were street cars, used habitually and customarily upon the city street railway lines; that they were used on this single occasion for interstate carrying purposes because of an unusually heavy pressure of business due to a race meet in Idaho; that they were not and could not be equipped with automatic couplers, their bodies being so low that there was not sufficient clearance for such couplers; that on the occasion in question they were coupled together by the link and pin couplers, with which they were equipped, in the shops at Spokane, and run solid into Idaho and back without uncoupling; that they were not and could not be coupled with other types of cars because of their style of construction. Transcript, pp. 20, 18. Such use of those cars was the basis for three causes of action stated in the complaint, and it being undisputed that on the occasion charged the cars were used in interstate commerce, and that they were not equipped with automatic couplers, the District Court held as matter of law that the Safety Appliance Act was violated, and

instructed the jury to find the Railroad Company guilty on those causes of action. Transcript, p. 26.

For the remaining causes of action the complaint charged that at divers times the Railroad Company used in interstate commerce cars which were not equipped with secure grab irons or handholds at the ends of the cars for the protection of men who were required to go between them to couple or uncouple them. With respect to those causes of action it is undisputed that the Railroad Company's interstate passenger trains run from the City of Spokane to Idaho points over the Company's private right of way, but that for a distance of about a mile and a quarter within the City limits, in order to reach the business portion of the City, they are run over the Company's street railway tracks, laid in the streets of the City. Where the trains run through the streets they stop at street corners to receive and discharge passengers going out of or coming into the City, but do no purely street car business; that is, do not carry passengers from point to point within the City. The run over the street railway lines on the City streets, however, is an integral, essential part of

every interstate run, for in no other way can the trains gain access to the business part of the City. Transcript, pp. 17-19.

It appears further—also without dispute—that in order to make the sharp street corner turns which the interstate trains are obliged to make in passing along the street railway tracks, the ends of the passenger cars are rounded, and the coupling bars between the cars are arranged so as to swing entirely from one side of the car to the other as may be necessary in making a right or left turn. Transcript, pp. 18-19. This renders it impossible to put the ordinary type of grab iron or handhold on the cars, since the usual type consists of an U-shaped iron rod which extends below the ends of the car, and such a type would prevent the coupling bars from swinging from one side of the cars to the other as is necessary when they are passing along the street railway tracks. To meet the situation, openings were provided in the angle iron which composes the top of the buffers at the ends of the cars. These openings were 22 inches long, 2 or 3 inches wide, set back from the front of the buffer about 3½ inches, and there was one

on each side of the coupler at each end of the cars. Transcript, pp. 18-20. The Government contended, as matter of fact, that these openings were not sufficient handholds for the protection of men required to go between the cars in the discharge of their duties, while the position of the Railroad Company was that these openings were better protection than the usual type of grab iron or handhold. The Government offered no evidence tending to show these openings insufficient for the intended purpose, but the Railroad Company offered the testimony of experienced railroad men, among others a man who had actually used and been obliged to rely upon these openings as handholds for his protection when between the cars, to establish that such openings served all the purposes of any type of grab iron or handhold, and were better fitted to protect men obliged to go between the cars than the usual type. This testimony was excluded on the ground that whether the handholds were sufficient protection was within the knowledge of the ordinary man and was not a subject for expert testimony. Transcript, pp. 22-24. The District Court sent the jury to inspect one of the cars in question, and instructed it that the Safety Appli-

ance Acts required no particular kind of grab iron or handhold to be used (it will be noted that the offenses charged were of a time prior to the adoption by the Interstate Commerce Commission of rules requiring the use of a particular kind of handhold); that all that was required was a handhold that would afford greater security to men coupling or uncoupling cars; and that it should determine from the testimony as to the nature of the handholds in question and from its personal examination of the cars whether such handholds afforded the protection to employes which the law contemplated. Transcript, p. 26.

The jury returned a verdict against the Railroad Company on all the causes of action. Transcript, p. 14.

SPECIFICATION OF ERRORS.

There was error

First: In denying the Railroad Company's motion to dismiss, made at the conclusion of the evidence, the three causes of action based upon the use in interstate commerce on the single occasion of three street cars unequipped with automatic couplers. Transcript, p. 24.

Second: In charging the jury as matter of law that such use was a violation of the Safety Appliance Act, and that it should find the Railroad Company guilty on all such causes of action. Transcript, p. 26.

Third: In denying the Railroad Company's motion to dismiss as to the remaining causes of action, those charging a failure to equip cars with sufficient grab irons or handholds. Transcript, p. 24.

Fourth: In denying the Railroad Company's requests that the jury be instructed to find for the defendant, and its motion for judgment *non obstante veredicto*. Transcript, pp. 24, 25, 27.

Fifth: In sustaining the Government's objections to the following questions addressed to the witnesses Robertson and Mahan respecting the handholds in the ends of the cars in question:

> "What would you say of them as a safe and proper appliance; one that would tend to preserve men from injury who might have to go between the cars for any purpose?"
>
> "Does that opening in the top of the sill serve the same purpose and is it as well fitted for the purpose of protecting the lives and

limbs of men who have occasion to go between the cars in the exercise of their duties as the form of grab irons that is used on steam cars, that is brought below the end of the car?"

"In your opinion, Mr. Mahan, and observation of these cars, is the opening in the angle bar a better and safer appliance for the safety of persons having occasion to go between the cars in the discharge of their duties than those that are used upon steam railroads?"

Transcript, pp. 22-24.

Sixth: In rejecting the following offers of proof made by the Railroad Company:

"Now, if your Honor pleases, I offer to prove by the witness on the stand, and I will call other witnesses, and particularly experienced railroad men, of years of experience, to prove by him and by them, by questions and answers addressed to them, that the opening in the beam or buffer of these electric cars is intended to subserve and does subserve the same purpose as the round iron appliance that is prescribed by the rules of the Interstate Commerce Commission at the present time and is in use on steam railroads, that it is a better appliance than these are for the purpose of protecting men from injury who have to go between the cars. I offer to prove that and to ask questions of this witness to that effect."

"I now offer to prove by this witness and also by other witnesses called, with your Honor's permission, that the opening in this angle iron or sill or buffer is a better and

safer appliance, better protection, greater protection to the men who have occasion to go between the cars than any form of grab-iron or hand-hold that is known in railroad circles."

Transcript, pp. 22, 24.

Seventh: In charging the jury that it should determine the sufficiency of the handholds from its observation of them. Transcript, p. 26.

Eighth: In denying the Railroad Company's motion for a new trial. Transcript, p. 27.

The foregoing specifications do no more than present in different ways the two questions first stated.

ARGUMENT.

I.

By the amendment of 1903 to the Safety Appliance Act there was added to the proviso by which sundry cars, trains and locomotives were excepted from its operation an exception of cars "which are used upon street railways." It is the contention of the Railroad Company that the cars on account of which it was convicted of a violation of the Safety Appliance Act are within that exception. Three of them—those not equipped with

automatic couplers — are street cars, pure and simple. Because of their construction it is impossible to equip them with automatic couplers. Their daily use is upon street railways, and there was but a single occasion when they were sent upon an interstate run, and a part of that run was upon a street railway. The other cars were not street cars, but they were none the less used upon street railways. Their use upon street railways was essential to their use for interstate carrying purposes, for an integral part of every interstate run, without which it could not be made, was the passage of the cars over the street railway tracks into the City of Spokane. It is only by construing the proviso as though it were written to apply only to cars which are "solely used" or "exclusively used" upon street railways, as did the District Court and the Circuit Court of Appeals, that the conclusion reached by those Courts can be sustained. With respect, such a construction seems painfully strained, particularly when the trend of the amendments to the Safety Appliance Act is considered.

The original Safety Appliance Act was only applicable to common carriers "engaged in interstate

commerce by railroad," and to vehicles "moving" or "used" in interstate traffic. The sole exception from the operation of the Act upon the general class of vehicles described in the enacting clause was made by a proviso incorporated in §6, which read:

> "*Provided*, That nothing in this Act contained shall apply to trains composed of four-wheel cars or to locomotives used in hauling such trains."
>
> 27 *Statutes*, 532.

The proviso was amended in 1896 to read:

> "Provided, That nothing in this Act contained shall apply to trains composed of four-wheel cars or to trains composed of eight-wheel standard logging cars (of certain dimensions), or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs."
>
> 29 *Statutes*, 85.

In 1903 the scope of the Act was much extended, being made applicable not only to interstate carriers by railroad but also to such carriers "in the Territories and the District of Columbia," and not only to vehicles used in the carriage of interstate traffic and of traffic in the Territories and in the District but also to trains, locomotives, etc.,

"used on any railroad engaged in interstate commerce, and in the Territories and the District of Columbia," and to "all other locomotives, tenders, cars, and similar vehicles used in connection therewith." 32 *Statutes,* 943. The broadening effect of this amendment was stated in *Southern R. Co. v. United States,* 222 U. S., 20, where its validity was attacked upon the theory that Congress had exceeded its jurisdiction in attempting to cover a field outside of interstate commerce.

While the amendment greatly extended the operation of the Act, it yet preserved the existing exceptions to its operation and added still another class to the excepted vehicles. It excepted from its provisions "those trains, cars, and locomotives exempted by the provisions of (the former Acts), or which are used upon street railways." And while by the Act of April 14, 1910, the Safety Appliance Act was made more stringent in several respects, the exceptions to its operation were retained as they had been fixed in 1903.

36 *Statutes,* 298.

The language of the exception relied upon is simple, and under accepted rules it does not seem

permissible to limit its operation by reading into it the word "exclusively."

> "Our duty is to read the statute according to the natural and obvious import of the language, without resorting to subtle and forced construction for the purpose of either limiting or extending its operation. Waller v. Harris, 20 Wend. (N. Y.), 561; Pott v. Arthur, 104 U. S., 735. When the language is plain, we have no right to insert words and phrases, so as to incorporate in the statute a new and distinct provision."
>
> *United States v. Temple,* 105 U. S., 97.
>
> "There being no ambiguity, there is no room for construction. It would be out of place. The section must be held to mean what the language imports. When a statute is clear and imperative, reasoning *ab inconvenienti* is of no avail. It is the duty of courts to execute it."
>
> *The Cherokee Tobacco,* 11 Wallace, 616.

To do so seems the more indefensible in view of the language of the immediately preceding exception, whereby there were excepted certain types of cars and locomotives used in hauling them "when such cars or locomotives are exclusively used for the transportation of logs." Congress evidently knew the proper word to employ to limit one exception, and evidently knew that where it was desired to limit it should be employed. Con-

gress did not use it in the next exception, and if the courts supply it on the theory that Congress intended the exception to apply only to cars which are used exclusively upon street railways they must do so on the assumption that in passing from one exception to the other Congress forgot the use, or the necessity for the use, of the word "exclusively" for purposes of limitation.

Moreover, to limit the exception to cars exclusively used upon street railways, or while in use upon street railways, is contrary to the meaning given the term "used" as it appears in other parts of the Act. Automatic couplers are required upon cars "used in moving interstate traffic." In *Johnson v. Southern Pacific Co.*, 196 U. S., 1, it was urged that the provision was not applicable to an empty dining car standing on a siding, and would not apply "Until the car was actually engaged in interstate movement or being put into a train for such use." The Court held that as the car had been used in interstate traffic, and was intended to be so used again, its temporary withdrawal from such use did not withdraw it from the operation of the Act. In *Wabash R. Co. v. United States,*

168 Fed., 1, it was held that a car which was "customarily or generally employed in moving interstate traffic" was within the Act, though at the particular time complained of it might have been empty or engaged in moving intrastate traffic. In *Southern Ry. Co. v. Snyder,* 187 Fed. 492, the Act was held applicable to cars "generally used interchangeably and indiscriminately in both interstate and intrastate traffic," without reference to whether, at the time of the alleged violation, they were "actually engaged in or used in connection with an interstate movement of traffic." It was again held applicable in *Erie R. Co. v. Russell,* 183 Fed., 722, though: "The car itself does not appear to have been used in any interstate commerce business at the time in question." So cars which have carried an interstate shipment are engaged in interstate commerce after being unloaded and for a reasonable time thereafter while waiting to be loaded for a return trip. *Davis v. Railroad Co.,* 146 Fed., 403.

If cars occasionally used in the movement of interstate traffic do not lose their character as cars "used in moving interstate traffic" while they are

being used for other purposes, it would seem that cars "which are used upon street railways" on every run they make do not lose their character as such merely because all their run is not upon street railways. The conclusion reached by the District Court and the Circuit Court of Appeals that the exception applied only to cars "used solely on street railways" not only interpolates something which Congress did not write, but as well is in flat defiance of an authoritative construction placed upon the same language in another part of the Act.

But if it is said that the language is so general as to be ambiguous, then the Congressional intent is to be sought; sought not only "in the entire context of the section—statutes or series of statutes in *pari materia*," *Atkins v. The Disintegrating Company*, 18 Wallace, 272, but also in the light of contemporaneous events and the general knowledge of mankind concerning the causes for the exception and what was designed to be achieved. *Preston v. Browder*, 1 Wheaton, 115; *United States v. Union P. R. Co.*, 91 U. S., 72; *Church of the Holy Trinity v. United States*, 143 U. S., 457.

That the Act is remedial, and should be liberally

construed to achieve its humanitarian purpose, is unquestioned. But in that there is no basis for the argument which was effectively used in the lower courts: that the exceptions from the operation of the Act should be strictly construed and given the most limited meaning the language permits. Actuated by humanitarianism as it was in the adoption of the Act, Congress nevertheless thought it proper at the outset to except one type of vehicles—four-wheel cars and locomotives used in hauling them—from its operation. Three years later the exception was enlarged to embrace other types of vehicles when "exclusively used" for log transportation. Seven years later the exception was again enlarged, this time to embrace, without the limiting word "exclusively," cars used upon street railways. Still another seven years, and Congress, rendering the Act more stringent and correcting deficiencies in it which experience had shown, did no more than make it applicable to the vehicles subject to the original Act and the amendments of 1896 and 1903. There was no abatement of humanitarianism; during the same period the Act was being extended in its general operation and made more stringent in response to the trend

of public opinion. In the light of these circumstances it will not do to say the courts should be ingenious to limit the effect of the exceptions because humanitarianism induced the Act. Congress thought it not inconsistent with humanitarianism to incorporate an exception in the original Act, and from time to time it has added to that exception. It is not reasonable to say that because the Act is remedial and its purpose beneficent, the rule of liberal construction will be applied in aid of the enacting clause, and that because the proviso limits the universality of the Act, the rule of strict, even forced, construction will be applied to keep its effect within the narrowest possible limits. Congress could have had but one purpose in the enactment of the whole Act, and no rule of law or logic warrants the courts in lauding and extending one part of the Act on the theory that it is benevolent, and disapproving and restricting the other part on the theory that it is malevolent. What was that purpose? for "* * * the general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down." *United States v. Whitridge,* 197 U. S., 135, 143.

Of course nothing but the commercial steam railroad was in mind in the enactment of the original Safety Appliance Act. Electricity as a motive power was in the experimental stage, and street railroads were not factors in interstate transportation. The historical consideration of the Act in *Johnson v. Southern Pac. Co.,* 196 U. S., 1, and the quotations from President Harrison's messages found therein, show that nothing but the equipment of steam commercial railroads was intended to be dealt with. The face of the Act proves the same thing, for it will scarcely be pretended that when Congress, in the title of the Act, and in sections one, six and eight thereof, spoke of "locomotives," "locomotive engine," "engineer on the locomotive," "driving wheel brake," etc., etc., it intended any vehicle used upon a street railroad, nor that the requirements in sections two and four of automatic couplers and of handholds for the protection of men in coupling and uncoupling cars, in section five of a standard height of drawbar to be fixed by the "American Railway Association," and the provisions in section three relative to the interchange of cars by connecting carriers, were intended to apply to street cars or street railroad

traffic. On a less stable foundation of intention deduced from the face of the Act, this Court held in *Omaha Street Ry. v. Interstate Com. Comm.*, 230 U. S., 324, that the generic term "railroad" as used in the Interstate Commerce Act, did not include "street railroad." The same construction is required here, for it is manifest that when the Act was adopted, and for a good many years after, Congress did not conceive that any type of railroad needed regulation but commercial steam railroads, and neither then nor now are the operations of street railroads of so hazardous a character that Congress would feel it necessary to legislate for the protection of their employes. We know from the Congressional discussion referred to by this Court in the *Omaha Street Railway Case*, and by the Commerce Court in the same *Case*, 191 Fed., 40, 46, that Congress did not deem it "necessary or practicable" to regulate a number of instruments of interstate commerce of minor character, among them, street railroads. So that what was said by the Court in the *Omaha Street Railway Case* seems thoroughly applicable, controlling, indeed, in the case at bar.

"But all the decisions hold that the meaning of the word is to be determined by construing the statute as a whole. If the scope of the act is such as to show that both classes of companies were within the legislative contemplation, then the word 'Railroad' will include Street Railroad. On the other hand, if the act was aimed at Railroads proper, then Street Railroads are excluded from the provisions of the statute. * * *

"Every provision of the statute is applicable to railroads. Only a few of its requirements are applicable to street railroads which did not do the business Congress had in contemplation and had not engaged in the pooling, rebating and discrimination which the statute was intended to prohibit. * * *

"Street railroads not being guilty of the mischief sought to be corrected, the remedial provision of the statute not being applicable to them, commands upon every railroad 'subject to the act' being such that they could not be obeyed by street railroads because of the nature of their business and character and location of their tracks, it is evident that the case is within that large line of authorities which hold that under such a statute the word 'railroad' cannot be construed to include street railroad."

What, then, did Congress intend when in 1903 it excepted from the operation of the Act cars "which are used upon street railways?" Not a mere exception of cars which are exclusively used

upon street railways, for that would be no more than to except street railroads from the operation of the Act; a senseless performance, since they were never within its operation. There is but one reasonable explanation for the exception. Interurban electric railroads had become common. They were factors in interstate passenger traffic worthy of attention. There were two classes, the interurban and the suburban. The Omaha-Council Bluffs railroad dealt with in the *Omaha Street Railway Case* is typical of the first class; connecting two near-by cities and, while using its private right of way as well as the street railway lines of the two cities, confining its business to the carriage of passengers and the mail. The second class are found where a city is the center of a well-settled district, but with no other city near. Their service is between city and country, and is more general in character. As described by the Commerce Court in the *Omaha Street Railway Case* (191 Fed., 40, 46): "They usually carry mail, express matter, and some freight, as well as passengers, and do not only a local business in more than one city and between cities, but also between city and country." There is no difference worthy

of note in the operation of the two classes. The character and volume of their traffic is such that they must gain access to the down-town business streets of the cities between or from which they operate. Their capital is so small, comparatively speaking, that they cannot afford a private right of way into the heart of cities, as have commercial railroads, nor, for that matter, could they well afford to use such a right of way, since the use of the streets is a great traffic getter for their local operations. Substantially the only difference between them is that one is more nearly urban in its operations than the other and so carries passengers only, while the more rural class carries the mixed traffic which the community it serves requires. Their methods of operation were well known, and Congress could not have been unaware that almost, if not entirely, without exception the passenger cars handling their local traffic used street railway lines in part. It does not seem doubtful that it was such traffic,, and the cars used in carrying it, that Congress intended by the exception in question. It is the only sensible explanation that can be given of the exception, since it would be senseless to except street railroads,

or what is the same thing, cars exclusively used upon street railroads, from the operation of the Act when the enacting clause did not embrace them. Moreover, the handling of cars used for local passenger service, such as would be desired or be permitted to run over street railway lines, would not be fraught with the perils which induced the Act. Such cars sometimes run singly, never in trains of more than two or three. There is not the coupling and uncoupling, the making up and breaking up of trains, the continued picking up and setting out of cars, which rendered hazardous the train operation which Congress had in mind.

It is objected to this construction that in recent years a new type of interurban railroad has been developed, running through the country from town to town and carrying passengers, freight, express, and the mail long distances at a high rate of speed, and that the operation of such roads is attended with all the hazards which induced the Safety Appliance Act, and therefore that this type of railroad, although not within the contemplation of Congress when the original act was adopted, ought to be held to be within its terms. A similar argu-

ment was urged in the *Omaha Street Railway Case,* and the answer of the court, in substance, was that it was only concerned with the actual case presented. That must be the answer here. There is no question in the case at bar of whether a particular type of railroad is within or without the Act. The Act does not purport to except any type of railroad from its operation; merely cars of a certain class, used in a certain manner. There are, no doubt, electrically operated railroads of the so-called interurban type which in their operations are scarcely distinguishable from steam commercial railroads. Such railroads have lines several hundred miles in length running through several states, carry much freight, and have sleeping- and dining-car service on their passenger trains such as steam railroads give. Trains of that sort would not be desired or permitted to operate in the public streets, just as a steam railroad would not desire or be permitted to operate its trains in the street. Even if its trains were operated in the streets, no doubt this Court would say, when such a case was presented to it, that cars so used were not in the contemplation of Congress, and so were not within the exception. But let such a case be dealt with

when it arises. The case before the Court is one of a street railway company owning a number of suburban lines which operate from a city of some size out into the country and surrounding towns and handling the local traffic between the country and the city. The superintendent of the company testified as to its lines:

> "The lines of the defendant company are operated by electricity. One line extends from Spokane to Coeur d'Alene, and then to Hayden Lake, Idaho. Another line from Spokane to Moscow, Idaho, and a third one from Spring Valley to Colfax, both in Washington. The company owns the city lines known as the Spokane Traction Company within the city limits, and one suburban line running out to Opportunity."
>
> Transcript, p. 19.

The company carries freight, but its freight traffic cuts no figure in determining the question presented, for its freight cars are not handled upon the city streets. As testified by the Government Inspector:

> "The cars handling freight are not brought down to the passenger station over the city streets. They stop at the freight terminals, and the cars handling freight are not run over the street railway line."
>
> Transcript, p. 18.

There is, of course, no claim that such cars are not subject to the Act. The sole question in the case is whether cars used as are the Railroad Company's passenger cars were intended by Congress when it excepted cars "used upon street railways." Of them the Government Inspector testified:

> "This road is an electric railroad operated by trolley cars, and the cars are run from the yards of the company over street railway lines through the streets of the City of Spokane from the freight yards of the company down to the passenger station. They are operated over street railway lines, tracks laid in the street over which street railway cars run."
>
> Transcript, p. 18.

The superintendent of the Railroad Company testified:

> "We do not take passengers on the interurban trains within the city limits exclusively. We receive passengers at points within the city limits for transportation outside, and drop passengers on the interurban trains at various points within the city. But within the city limits we do no strictly street car business. * * * The stops on our interurban lines are from three to a mile to one for every mile, being nearer together as the city is approached. We do a local business, picking up people at cross-roads, bringing them in and taking them back. In going out of and coming into town on the street railway lines on the city streets

> we stop at all intersecting lines to take on and discharge passengers. The street railway lines are used for about a mile and a quarter. * * * The cars in street railway service are generally operated singly, but not always so. Generally, two or more cars are used in the interurban service, though at the present time we are running some single cars."
>
> Transcript, pp. 21, 22.

Cars such as those in question are a sort of rural street-car. Instead of stopping at city street corners to pick up passengers to carry them to some other city street corner, they pick up "people at cross-roads, bringing them in and taking them back." Instead of stopping every hundred yards or so as on city streets their stops are "three to a mile to one for every mile, being nearer together as the city is approached." Street cars "are generally operated singly, but not always so." On the other hand, "two or more cars are used in the interurban service, though at the present time we are running some single cars." There is small difference between such operation and street car operation. There is as little difference in the hazards of the two operations, for if interurban cars usually move in trains of two to three cars, so sometimes do street cars—always, indeed, in the

larger cities of the country, or in service like the Omaha-Council Bluffs line. We submit, therefore, that unless it be said Congress meant to except nothing but street railroad service from the Act, the exception covers the cars in question. And before it is said that nothing but street railroad service was intended to be excepted, it should be considered why Congress thought it necessary to specifically except street railroads when they were not within the enacting clause, and why it used an ambiguous expression when the unequivocal is self-suggestive.

Much is made of the fact that tickets are sold for and baggage carried upon the interurban trains, and that they are run by standard train rules. That care has been taken for the convenience and safety of passengers scarcely affects the character of the service rendered.

Importance is sought to be attached to the decision of this Court in *Moore v. Transportation Co.*, 24 Howard, 1. There an act limiting the liability of "ship owners" provided that it should not apply to any "canal boat, barge, or lighter, or to any vessel of any description whatsoever

used in rivers or inland navigation." The Court, applying the rule *ejusdem generis,* considering the nature of the navigation and the magnitude of the transactions evidently intended to be affected by the Act, and reading the whole Act in the light of historical events and its knowledge of the inland waters of the United States and the character of the navigation and transportation thereon, construed the term "used" to mean "solely employed," and hence that the act was not applicable to navigation upon the Great Lakes. The decision, unquestionably, is valuable to the point that when the precise sense in which a term is used in a statute is in doubt, the courts will read the whole act together and arrive at the purpose of every part, calling to their assistance, when necessary, common knowledge of historical and contemporaneous events, including geographical features and the course of trade. It is for such a construction of the Appliance Act that we contend. But we are unable to discover its value to the Government's side of this controversy, for we cannot suppose it will be claimed that because the Court read the term "used" to mean "solely employed" in construing an act relating to navigation passed

in 1851, it is bound to so read the term when it appears in an act relating to railroad equipment passed in 1903. Construction of an ambiguous statute is by the spirit, not by rote.

This case has been heretofore treated as though it were an attempt to remove an important class of railroads from the operation of the Act. There is no warrant for such treatment. We concede that an interurban electric road which carries passengers, freight, mail and express across a state line is a railroad within the purview of the Act. Nothing is involved but this contention: That passenger cars furnishing a small local service, picking up passengers at every country cross-roads, bringing them into town one hour and taking them back to their homes the next, are, when street railway lines are necessarily used for a part of the trip, cars "used upon street railways" within both the letter and the spirit of the Act.

II.

If the Act is held applicable to the cars involved, there will remain the question whether error was committed in excluding expert testimony relative to the sufficiency of the handholds on the cars.

The Act requires that cars used in interstate commerce shall be provided with "secure grab-irons or handholds * * * for greater security to men in coupling and uncoupling cars." 27 *Statutes*, 531. The offenses charged were prior to the order of the Interstate Commerce Commission, made under authorization of the amendment of April 14, 1910 (36 *Statutes*, 298), fixing the type, dimensions and location of handholds and grab-irons. In actual use there was then no fixed standard of grab-iron or handhold (Transcript, pp. 19-20), and obviously the statute required no more than that they should be "secure," and designed for the "greater security" of employes. *United States v. B. & M. R. Co.*, 168 U. S., 148. Conceiving that railroad men possessed better qualifications than ordinary men to say when appliances were secure, the Railroad Company called two witnesses to testify concerning the sufficiency of the handholds on the cars, and to their value as safeguards for men going between the cars; Robertson, a conductor on the Great Northern Railroad, with twenty-three years' experience on steam railroads as brakeman, switchman, yardmaster, and conductor; and Mahan, its general shop foreman,

a man with steam railroad experience, and who had used and relied upon the grab-iron or handholds in question in his work around the cars. Transcript, pp. 22-24. The testimony was excluded on the ground that what "is a reasonably safe appliance is within the knowledge of the ordinary man and no special experience is required." Transcript, p. 23. The jury was charged that the purpose of the act was "to afford greater security to men coupling or uncoupling cars"; that "no particular kind of grab-iron or handhold" was required by law, but only an appliance which men going between cars could grasp for their protection; and that it was to determine from its view of the cars and the general testimony concerning grab-irons or handholds whether the appliance provided by the Company "affords that safety and protection to employes which the law contemplates and requires." Transcript, p. 26.

The question is squarely presented, therefore, whether the operation of trains, and particularly the perils to which trainmen are exposed in going between cars in the discharge of their duties, and how those perils may be best guarded against, are

matters as well known to the ordinary man on the street as to the experienced railroad man.

The question could be readily solved by asking the average man on the street if he felt sufficiently versed in train operation to go into railroad yards and undertake a switchman's or trainman's duties without instruction. As that method of solution is not open, however, resort must be had to court decisions.

At the risk of tediousness over familiar principles, we quote briefly from a very few opinions upon the subject of expert testimony. It is not admissible upon questions "depending on common knowledge and observation, and requiring no special training or experience to decide." *Inland etc. Co. v. Tolson*, 139 U. S., 551, 560, but it is "upon subjects on which the jury are not as well able to judge for themselves as is the witness." *Transportation Line v. Hope*, 95 U. S., 297, 298.

Mr. Justice Van Devanter, when on the Circuit Bench, after reviewing a great number of decisions concerning the admissibility of expert testimony relating to the commoner vocations in life, said:

"Doubtless the farmers, stockgrowers, mer-

chants, and clerks who composed the jury were more or less capable of judging of the safety of the scaffold in question and of the necessity for securing the planks in one of the modes suggested; but it is quite reasonable to believe that they were not as capable of doing so as a practical brick mason and builder of many years' experience in the use and construction of scaffolds, and that the opinion of a witness possessed of the special knowledge which is born of such experience was calculated appreciably to aid them in reaching a correct conclusion."

United States S. Co. v. Parry, 166 Fed., 407, 415.

Of the admissibility of expert testimony relating to train operation it has been said:

"That the running and management of railroad locomotives and trains is so far an art, outside of the experience and knowledge of ordinary jurors, as to render the opinions of persons acquainted with the running and management of such locomotives and trains, as experts, admissible and proper testimony, in proper cases, is very clear on principle, and is so recognized in Quimby v. Vermont Central Railway, 23 Vt. R., 394, and Illinois Central Railway v. Ready, 17 Ill. R., 580."

Bellefontaine etc. Co. v. Bailey, 11 Ohio St., 333, 335.

This Court has always held expert testimony admissible upon matters relating to navigation.

Ogden v. Parsons, 23 Howard, 167; *Transportation Line v. Hope,* 95 U. S., 297; *Union Ins. Co. v. Smith,* 124 U. S., 405. Occasion to speak of its admissibility in railroad matters has been rare, but it has always been maintained. *Texas etc. Co. v. Watson,* 190 U. S., 287; *Union P. R. Co. v. Clapper,* 131 U. S., Appendix CXCII. In the Circuit Courts of Appeals, considering nothing but their rulings with respect to the admissibility of expert testimony upon matters connected with railroad operation, such testimony has been held admissible upon the following subjects:

As to the number of brakemen necessary to control a train.

Union Pac. Ry. v. Novak, 61 Fed., 573.

As to whether a rough track would be likely to cause a coupling pin to be thrown out when train was going down grade.

Chicago G. W. Ry. Co. v. Price, 97 Fed., 423.

What good railroading requires with respect to the erection of telltales on each side of overhead bridges.

Pittsburg etc. Co. v. Lamphere, 137 Fed., 20.

What number of cars could be let down an incline with only one good brake.

Chicago etc. Co. v. Hale, 176 Fed., 71.

That a siding should have been equipped with a derailing switch.

Troxell v. Railway Co., 180 Fed., 871.

The distance within which an engine could have been stopped.

Mahoning etc. Co. v. Blomfelt, 163 Fed., 827.

Concerning the condition of a car coupler and what was required to operate it.

Wabash R. Co. v. U. S., 168 Fed., 1.

The last cited case is so much like the case at bar, and the conclusion reached is so utterly opposed to the decisions of the lower Courts in this case, that we quote from it.

> "An expert trainman, after describing the broken condition of a coupler, was asked:
>
> 'In the condition in which that coupler was on that end of the car at that time, what was necessary in order to operate the coupler?'
>
> He answered:
>
> 'It would necessitate a man going between the ends of the cars and taking the part of

the chain that was left with the coupler to operate that coupler.'

The question was objected to on the ground that it called for a conclusion and invaded the province of the jury. In our judgment the mode of operation of automatic coupling mechanism and the effect of various conditions thereof were proper subjects for expert testimony."

Wabash R. Co. v. U. S., 168 Fed., 1.

In the State Courts, still confining our attention exclusively to rulings upon railroad operation, expert testimony has been held admissible upon the following matters:

Alabama.

What good railroading requires in way of "whipping straps" to warn of proximity of overhead bridge.

Louisville etc. Co. v. Hall, 6 So., 277.

Competency of one-armed brakeman.

Louisville etc. Co. v. Davis, 12 So., 786.

Letting off a "tight brake."

Louisville etc. Co. v. Binion, 18 So., 75.

Whether ordinarily there is anything under a tender to cause injury to one knocked down by it.

Louisville etc. Co. v. Banks, 31 So., 573.

Whether unusual or unnecessary noises were made by the engine at time of an injury.

Boan v. Lbr. Co., 63 So., 564.

Arkansas.

Whether drawheads will pass each other if properly constructed.

Kansas C. So. R. v. Henrie, 112 S. W., 967.

California.

Manner of running electric cars, speed and facility with which they may be stopped proper subject for expert testimony.

Howland v. Railway Co., 42 Pac., 983.

What experience is required to qualify brakemen for that occupation.

Peters v. Ry. Co., 116 Pac., 400.

Colorado.

Whether a railroad in process of construction was safe for transportation of laborers.

Colorado etc. Co. v. O'Brien, 27 Pac., 701.

District of Columbia.

A brakeman may testify as to wherein a coup-

ling causing an injury was unsafe.

Balto etc. Co. v. Elliott, 9 App. D. C., 341.

Georgia.

Whether train moving at usual speed for coupling.

Goodwyn v. Ry. Co., 58 S. E., 688.

Indiana.

Relative danger of different styles of couplings.

Louisville etc. Co. v. Frawley, 9 N. E., 594.

Whether guard rails required on curves.

Ry. Co. v. Snead, 93 N. E., 177.

Iowa.

Effect of sudden increase of speed of train upon coupling pins and links.

Whitsett v. Railway Co., 25 N. W., 104.

Proper position of brakeman in making flying switch.

Reifsnyder v. Railway Co., 57 N. W., 692.

Whether peculiar actions of engine indicated a broken axle.

Brownfield v. Railway Co., 77 N. W., 1038.

Whether unblocked switch frogs are dangerous.

Schroeder v. Railway Co., 103 N. W., 985.

Kansas.

Engineer may testify whether locomotive equipped with good spark arrester would throw sparks sufficient to ignite property on right of way.

Kansas City etc. Co. v. Blaker, 75 Pac., 71.

Kentucky.

As to what is a sufficient railroad track.

Stewart's Admx. v. Ry. Co., 125 S. W., 154.

Maryland.

Expert evidence admissible to show whether railroad had complied with provisions of city ordinance relative to construction of tunnel.

Baltimore etc. Co. v. Satler, 59 Atl., 654.

Whether railroad so constructed as to permit drainage.

Baltimore etc. Co. v. Hackett, 39 Atl., 510.

Dangerous character of water pit used to receive ashes from locomotive.

Ry. Co. v. Whitacre, 92 Atl., 1060.

Michigan.

Whether cattle guard in proper condition to turn cattle.

Johnson v. Railway Co., 97 N. W., 760.

Missouri.

Whether danger of coupling cars was increased by bent coupling pin.

Goins v. Railway Co., 47 Mo. App., 173.

Montana.

Whether boiler reasonably safe after being patched.

Copenhaver v. Ry. Co., 113 Pac., 467.

Nebraska.

Duties of employes in examining appliances about cars.

Mo. Pac. R. Co. v. Fox, 83 N. W., 744.

New York.

Distance sparks would be thrown if spark arrester in good order.

Jamison v. Railway Co., 57 N. E., 1113.

Whether a rule regulating work in railroad

yards practicable.

Fremont v. Ry. Co., 80 N. E., 1109.

Ohio.

What is proper place for brakeman.

Cincinnati etc. Co. v. Smith, 22 Ohio St., 227.

Oklahoma.

Whether danger to experienced man in catching train running slowly.

Ry. Co. v. Miller, 145 Pac., 367.

Texas.

Conclusions respecting building and repairing cars. *Jones v. Shaw*, 41 S. W., 690, and as to how track could be made safest, *Railway Co. v. Pitts*, 42 S. W., 255, admissible.

What would be indicated with reference to angle cock if air hose jerked out of workman's hands.

Railway Co. v. Mills, 78 S. W. 11.

Method of inspecting handholds and what would be discoverable by proper inspection.

Ry. Co. v. Beauchamp, 116 S. W., 1163.

Whether loose stirrup dangerous to climb upon

when car in motion.

Ry. Co. v. Neef, 138 S. W., 1168.

Distance structures should be placed from track to protect employes upon cars.

Ry. Co. v. Bryant, 162 S. W., 400.

Wisconsin.

That a fender is part of most approved plan of construction of street car.

Fisher v. Ry. Co., 124 N. W., 1005.

It only remains to add that, so far as our research discloses, no case can be found in the books, save the decision of the lower Courts in this case, denying the admissibility of expert testimony upon any question akin to that presented here.

Respectfully submitted,

WILL G. GRAVES,
Attorney for Plaintiff in Error.

F. H. GRAVES,
B. H. KIZER,
Of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1915.

SPOKANE & INLAND EMPIRE RAILROAD Company, Plaintiff in Error, *v.* THE UNITED STATES. } No. 136.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT OF CASE.

This is a civil proceeding by the United States against the Spokane & Inland Empire Railroad Company to recover $1,500 for fifteen alleged violations of the safety-appliance act, approved March 2, 1893 (27 Stat. 531), as amended April 1, 1896 (29 Stat. 85), and March 2, 1903 (32 Stat. 943).

The first twelve counts charge that grab irons, and the last three counts that automatic couplers, were not provided on cars moving in interstate commerce as required by the act.

The case was brought in the United States District Court for the Eastern District of Washington.

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The trial resulted in verdict and judgment in favor of the Government on all counts, verdict having been directed on the last three counts. The case was taken by writ of error to the Circuit Court of Appeals for the Ninth Circuit, which unanimously affirmed the judgment of the District Court. (210 Fed. 243.)

STATEMENT OF FACTS.

Plaintiff in error operates several interurban electric lines. "One line extends from Spokane to Coeur d'Alene, and then to Hayden Lake, Idaho. Another line from Spokane to Moscow, Idaho, and a third one from Spring Valley to Colfax, both in Washington." (R. 19.) The particular line under consideration extends from Spokane, Washington, to Coeur d'Alene, Idaho, and is about forty miles in length, all of which is over the company's private right of way, except a mile and a quarter located upon the streets of Spokane. (R. 21.) The track is of standard gauge and weight of rail. (R. 20.) The trains "are made up according to standard railroad rules with markers to designate the trains, and are run on schedules and by train orders." (R. 20.) "The passenger station is reached by all interurban trains by leaving the freight yards [in which presumably the trains are made up] where they intersect Market Street, using Market Street to Main Avenue, Main Avenue to Lincoln, and Lincoln into the depot." (R. 19.) "On the interurban lines, tickets are sold for particular stations, the same as a railroad." (R.

20.) "The employees who are engaged in the street-car service do not have anything to do with the operation of the interurban service." (R. 20–21.) Some of the trains handle baggage and express, while freight moves over the line in freight cars. (R. 17.) "The cars handling freight are not brought down to the passenger station over the city streets. They stop at the freight terminals, and the cars handling freight are not run over the street railway line." (R. 18.) The cars ordinarily operated on this line have power brakes, and it is necessary for employees to go between cars in order to couple up the air hose and connect wires for electric heating and lighting. (R. 21.)

Three of the cars, in the particular movement in question, were not equipped with automatic couplers, and the other twelve did not have grab irons, unless an opening in the sill or buffer of the car, described below, could be considered as such.

ARGUMENT.

The case presents two questions:

I. Do the provisions of the safety appliance acts apply to interurban cars, which move for a small portion of the route over the tracks of a street railway?

II. Is the testimony of expert witnesses admissible to the effect that openings in the buffer of the car are better and safer than the grab iron or handhold known in railroad circles?

I.

The provisions of the safety appliance acts are applicable to interurban electric cars.

The act as amended provides:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the provisions and requirements of the Act entitled "An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes," approved March second, eighteen hundred and ninety-three, and amended April first, eighteen hundred and ninety-six, shall be held to apply to common carriers by railroads in the Territories and the District of Columbia and shall apply in all cases, whether or not the couplers brought together are of the same kind, make, or type; and the provisions and requirements hereof and of said Acts relating to train brakes, automatic couplers, grab irons, and the height of drawbars shall be held to apply to all trains, *locomotives,* tenders, cars, and *similar vehicles* used on any railroad engaged in interstate commerce, and in the Territories and the District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith, excepting those trains, cars, and locomotives exempted by the provisions of section six of said Act of March second, eighteen hundred and ninety-three, as amended

> by the Act of April first, eighteen hundred and ninety-six, *or which are used upon street railways.* (32 Stat. 943.) [Italics ours.]

The act is remedial and should be liberally construed. Its primary object is to promote the public welfare by securing the safety of employees and travelers. (*Johnson* v. *Southern Pacific*, 196 U. S. 1; *United States* v. *Central of Georgia Ry. Co.*, 157 Fed. 893, 894; *United States* v. *C., B. & Q. R. R. Co.*, 237 U. S. 410, 413; *United States* v. *Erie Railroad Co.*, 237 U. S. 402.)

It is just as necessary to the accomplishment of this purpose that the cars described be equipped as required by the act as that those drawn by steam should be so equipped. Nor is it material that a negligible part, in this case about one thirty-fourth, of the movement was over tracks used by street cars.

The provision in question is by the very terms of the act made applicable to "all trains, locomotives, tenders, cars, and *similar vehicles used on any railroad* engaged in interstate commerce," etc. This court stated in the case of *Omaha Street Railway* v. *Interstate Commerce Commission* (230 U. S. 324, 335) that "if the scope of the act is such as to show that both classes of companies were within the legislative contemplation, then the word 'Railroad' will include Street Railroad."

The facts of this case bring it within both the letter of the statute and the scope of its purpose.

Plaintiff in error concedes that "an interurban electric road which carries passengers, freight, mail,

and express across a State line is a railroad within the purview of the act" (Brief, p. 32), and states that "there is no question in the case at bar of whether a particular type of railroad is within or without the act. The act does not purport to except any type of railroad from its operation; merely cars of a certain class, used in a certain manner." (Brief, p. 26.) It is also conceded that, since the company uses this interstate line for its freight cars, not handled upon the city streets (Brief, p. 27), "there is, of course, no claim that such cars are not subject to the act." (Brief, p. 28.) In this connection see *Southern Ry. Co.* v. *United States*, 222 U. S. 20, and *Spokane & Inland Empire R. R. Co.* v. *Campbell* (C. C. A., 9th Circuit), 217 Fed. 518.

This phase of the case, therefore, may be limited to a consideration of whether or not the particular trains and cars in question fall within the exception which exempts from the operation of the act "trains, cars, and locomotives * * * which are used upon street railways."

The exception relied upon is in the nature of a proviso and should be construed strictly, and not extended to cover exceptions not clearly within its terms.

> We are led to the general rule of law, which has always prevailed, and become consecrated almost as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is

> construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause; and those who set up any such exception must establish it as being within the words as well as within the reasons thereof. (*United States* v. *Dickson*, 15 Pet. 141, 165.)

In *Arnold* v. *United States* (147 U. S. 494, 499) the court quoted from *Brown* v. *Maryland* (12 Wheat. 419) as follows:

> Chief Justice Marshall recognized as "a rule of interpretation to which all assent that the exception of a particular thing from general words proves that, in the opinion of the lawgiver, the thing excepted would be within the general clause had the exception not been made."

Plaintiff's claim reduces itself to the proposition that an interstate carrier may exempt itself from compliance with the provisions of the safety-appliance acts by merely operating its trains over a small portion of the tracks used by street cars. The Circuit Court of Appeals aptly characterized this claim as follows:

> To hold with the plaintiff in error on this point would be to hold that, because the company uses the tracks of its street car lines for a mere trifle of the distance between its terminal points in order to reach the center of the city of Spokane, its entire interurban line, which has all of the characteristics in build and operation of a standard steam road, is not

> subject to the Safety Appliance Act. That would indeed be a case of "the tail wagging the dog." (210 Fed. 243, 246.)

An analogous claim was made in a case arising under the hours of service act. In rejecting the claim, this court said:

> A trifling interruption would not be considered, and it is possible that even three hours by night and three hours by day would not exclude the office from all operation of the law, and to that extent defeat what we believe was its intent. (*United States* v. *Atchison, T. & S. F. Ry. Co.*, 220 U. S. 37, 44.)

The Government insists that here also the insignificant incident of the use of street car tracks for a trifling portion of the entire route would not exempt the interurban trains from the operation of the law during the entire movement.

II.

Testimony of expert witnesses to the effect that openings in the buffer of a car were better than the ordinary grab iron properly excluded.

The provisions of the act relating to grab irons is as follows:

> * * * it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars. (Sec. 4, Act of March 2, 1893, 27 Stat. 531.)

The trial court instructed the jury that:

> If you should find from the evidence in this case that although there might not have been on the ends of the cars referred to anything which would be known technically as grab-irons or hand-holds, yet if there were upon the ends of such cars an appliance which could be used as a grab-iron or hand-hold and which would afford as much security to men coupling or uncoupling the cars as would be afforded by having what would be technically known as grab-irons or hand-holds on the ends of the cars, then your verdict should be for the defendant. (R. 26.)

This instruction was certainly as favorable as the plaintiff in error could reasonably expect.

The openings in the sills or buffers of the cars which were claimed to satisfy the requirements of the act are described as follows:

> The openings in the end sills provide an absolute grab of the fingers * * *. The purpose of a hand-hold is to afford security to a man who is between the cars if for any reason they should start. It is necessary for men to go between the cars and stoop down to connect the air hose and the electric light and heating wires. The man who is down between the cars is within four or five inches of the ground with his hands. If the car starts, he has to reach up 37 or 38 inches from the ground to get to the top of the end sill, and has to place his hand 3½ inches over the top of the sill if he reaches the opening, and then turn it an inch or three-quarters before

> he can get enough to grab on. * * * I don't believe I could get much more than the ends of my fingers up there myself. (Testimony of superintendent of interurban system, R. 21.)

Though the evidence thus minutely described these openings in the buffers of the cars, the jury were permitted to view them, and, in this connection, were instructed as follows:

> It is for you to say from that testimony and from your personal examination of the cars whether the appliance provided by this company complies with the Act of Congress. (R. 26.)

Upon this issue, plaintiff in error offered to prove by experienced railroad men who had examined the cars, that—

> the hand-holds or grab-irons in the buffers or sills of such cars were sufficient to protect men who might be required to go between the cars in coupling or otherwise handling them, that they were sufficient to accomplish purposes intended to be accomplished by the provisions of the safety appliance act requiring hand-holds or grab-irons to be placed upon the end of cars used in interstate commerce, and that they were better than those commonly used upon cars engaged in interstate commerce. (R. 29.)

This evidence was excluded upon the ground that the jurors were fully as competent to pass upon the question in issue as experts, and that

to admit such testimony would be to invade the province of the jury.

It is hard to conceive how experts could have afforded any assistance to the jury in determining whether a buffer of a car, which they had seen, with a slot 3½ inches from its edge, was as safe or safer to grab in an emergency than a regular grab iron. This was the very issue the jury were to determine, and calls for nothing more than the exercise of ordinary common sense. There was no question of science involved, but simply one depending upon common knowledge and observation, and requiring no special training or experience to decide. The evidence was therefore properly excluded.

> Where the subject of a proposed inquiry before a court is not a matter of science, but of common observation, upon which the ordinary mind is capable of forming a judgment, experts ought not to be permitted to state their conclusions. (*Milwaukee & St. Paul Ry. Co.* v. *Kellogg*, 94 U. S. 469, syllabus.)
>
> Whether a witness is shown to be qualified to testify to any matter of opinion is always a preliminary question for the judge presiding at the trial, and his decision thereon is conclusive unless clearly erroneous as matter of law. *Spring Co.* v. *Edgar*, 99 U. S. 645; *Stillwell & Bierce Co.* v. *Phelps*, 130 U. S. 520; *Montana Railway* v. *Warren*, 137 U. S. 348. But in this case, independently of any such consideration, the question whether the place where the plaintiff stood on the wharf was reasonably safe was one of the questions to be

> determined by the jury, depending on common knowledge and observation, and requiring no special training or experience to decide, and upon which therefore no opinions of witnesses were admissible. *Milwaukee & St. Paul Railway* v. *Kellogg*, 94 U. S. 469; *White* v. *Ballou*, 8 Allen, 408; *Simmons* v. *New Bedford Steamboat Co.* 97 Mass. 361; (*Inland & Seaboard Coasting Company* v. *Tolson*, 139 U. S. 551, 559.)

This evidence might likewise have been excluded upon the ground that the law specifies handholds or grab irons, devices well known in the railroad world, and did not authorize any substitute.

> Technical words or phrases in a statute will be understood in a technical sense when the act treats of the subject in relation to which such words are technically employed. (Sutherland, Statutory Construction, 2d ed., sec. 395, and cases cited.)

The following description, as given in the Car Builders' Dictionary (1909), p. 130, discloses how inadequate are the slotlike openings in the buffer as a compliance with the provision requiring grab irons or handholds on cars:

> All handholds should be made of iron not less than $\frac{5}{8}$ inch in diameter; handholds on the sides and ends of cars should be 24 inches long in the clear, except end-sill handholds, which should be from 18 to 24 inches long.

In a recent case construing this statute the court said:

> The precautions taken by a carrier might afford as complete, or indeed fuller, protection to its employees than the means demanded by the law. It none the less follows that imposition of the penalty must be visited upon the carrier guilty of a noncompliance with the act of Congress. (*United States* v. *Philadelphia & Reading Ry. Co.*, 223 Fed. 215, 217; see also *Virginian Ry. Co.* v. *United States*, id. 748, C. C. A., 4th Circuit.)

CONCLUSION.

The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully,

E. MARVIN UNDERWOOD,
Assistant Attorney General.

JOHN C. BROOKE,
Assistant Attorney.

DECEMBER, 1915.

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SPOKANE & INLAND EMPIRE RAILROAD COMPANY *v.* UNITED STATES.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 136. Submitted December 15, 1915.—Decided June 5, 1916.

Exceptions from the general policy which the law embodies are to be strictly construed, and are to be so interpreted as not to destroy the remedial purpose intended.

The exception contained in § 6 of the Safety Appliance Act of March 2, 1893, as amended April 1, 1896, and March 2, 1903, exempting from its operation cars which are used upon street railways, does not exempt cars used in regular interstate traffic which are also to some extent used on street railways. Such cars are covered by the general provisions of the statute.

Cars used on an electric railway doing an interstate business on a standard gauge track according to standard railroad rules *held*, in this case, to be subject to the Safety Appliance Acts in regard to grab-irons and hand-holds, notwithstanding they were used at the terminals of the roads upon street railways.

The Safety Appliance Acts may not be violated with impunity by omitting grab-irons and hand-holds from cars because the railroad

company operating them deems the provisions of the act onerous or because it considers that it has adopted methods to protect the employees in coupling the cars that are more expedient than those required by the statute.

Whether methods substituted for grab-irons and hand-holds in coupling cars used in interstate commerce other than those prescribed by the Safety Appliance Acts offer the same, or better, or adequate protection to employees, is not a question for expert testimony.

210 Fed. Rep. 243, affirmed.

THE facts, which involve the construction of the Safety Appliance Act and its application to suburban electric Railroads, are stated in the opinion.

Mr. Will G. Graves, Mr. F. H. Graves and *Mr. B. H. Kizer* for plaintiff in error.

Mr. Assistant Attorney General Underwood and *Mr. John C. Brooke* for the United States.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

The United States brought this suit against the Railroad Company to recover penalties for fifteen alleged violations of the Safety Appliance Act. The violations consisted in hauling in interstate commerce on October 23, 1911, twelve cars which were not provided with hand-holds or grab-irons at the ends, as required by the act, and three cars which were not equipped with automatic couplers. The answer admitted that at the time named all fifteen cars had been used in interstate commerce and that three of them were not equipped with automatic couplers, but denied that the other twelve were not provided with hand-holds or grab-irons as required by the act and denied that it had in any respect violated the act because all fifteen cars were used by the company upon its line of street railway and were therefore expressly excepted from the operation of the act. A verdict and judgment against

the company on all fifteen charges was affirmed by the court below.

We briefly state the material facts. The Railroad Company operated a street railway system in Spokane, Washington, and several interurban electric lines, one of which extended from Spokane to Cœur d'Alene, Idaho, a distance of about forty miles. Over this line passenger trains composed of two or more cars were operated starting at a station near the center of Spokane and running for a mile and a quarter on the street railway tracks to the company's yards near the city limits and thence over its private right of way to Cœur d'Alene. The road was standard gauge, with rails of standard weight and the passenger trains were made up according to standard railroad rules with markers to designate the trains and were run on schedules and by train orders. Passengers traveled on tickets entitling them to ride to and from designated stations at which regular stops were made and express matter and baggage were carried on the passenger trains. The street-car business was entirely separate from that done by the interurban line, the employees of the one having nothing whatever to do with the other, and although stops were made by interurban trains within the city limits and while on the street railway tracks, they were made solely for the purpose of taking on and letting off passengers to or from stations outside the city. In addition to its passenger trains the interurban line also operated freight trains which, however, started from the company's yards and ran directly to Cœur d'Alene and did not therefore enter upon the street railway tracks.

The fifteen cars here in question were passenger cars and on the day named were used in passenger trains which were run from the station in Spokane to the city limits and thence over the company's right of way to Cœur d'Alene. Twelve of them (those which it was charged were not equipped at the ends with grab-irons or hand-

holds) were cars regularly used on the interurban lines and were rounded at the ends and equipped with radial couplers to enable the trains to make sharp turns. As the swinging of these couplers from one side to the other across the ends of the cars would break off grab-irons of the type ordinarily used on the ends of cars they were not used. It was claimed, however, that the requirements of the Safety Appliance Act with respect to hand-holds or grab-irons were in substance complied with by a different and what was asserted to be an equivalent appliance, that is, openings in the top of the buffer or sill extending across the ends of the cars just above the couplers. To support this claim the company offered testimony of experienced railroad men to the effect "that the hand-holds or grab-irons in the buffers or sills of such cars were sufficient to protect men who might be required to go between the cars in coupling or otherwise handling them, that they were sufficient to accomplish purposes intended to be accomplished by the provisions of the Safety Appliance Act requiring hand-holds or grab-irons to be placed upon the ends of cars used in interstate commerce, and that they were better than those commonly used upon cars engaged in interstate commerce." The United States objected to the introduction of the testimony and it was excluded on the ground "that it was not a question for expert testimony, but was a matter of common knowledge." During the trial, (at whose request it does not appear) the jury were taken to inspect the openings in some of the cars.

The other three cars were large street cars which were regularly used only on the street railway tracks, but which because of unusually heavy traffic on the day named were coupled together with link and pin couplers and operated as a train to Cœur d'Alene.

The assignments of error present two questions which we consider separately.

1. It is urged that error was committed in construing the Safety Appliance Act since, when correctly interpreted, the fifteen cars in question were expressly excepted from its requirements. To appreciate the contentions based upon this proposition it is necessary to recur to the text of the original act and the amendments thereto. By the act of March 2, 1893, (c. 196, 27 Stat. 531) it was made unlawful for any common carrier "to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact," (§ 2) or "to use any car in interstate commerce that is not provided with secure grab irons or hand holds in the ends and sides of each car for greater security to men in coupling and uncoupling cars," (§ 4), with the proviso (§ 6) that the prohibitions of the act should not apply to "trains composed of four-wheel cars or to locomotives used in hauling such trains." By the act of April 1, 1896 (c. 87, 29 Stat. 85), the proviso of § 6 was amended as follows: "That nothing in this act contained shall apply to trains of four-wheel cars or to trains composed of eight-wheel standard logging cars . . . or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs." By the amendment of March 2, 1903 (c. 976, 32 Stat. 943) the provisions of the act relating to automatic couplers, grab-irons, etc., were extended and made applicable to "all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the Territories and the District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith," and to the exceptions from the requirements of the original act and the Amendment of 1896 were added "trains, cars, and locomotives . . . which are used upon street railways."

The contention is that as the trains in which the fifteen cars were hauled were operated over the street railway

tracks from the station in Spokane to the yards of the company, they were "used upon street railways" and were hence expressly exempted from the requirements of the act by the amendment of 1903. This, it is said, results from the unambiguous text of the exception contained in that amendment and is from a two-fold point of view made additionally certain by the context of the act which we have quoted. The argument is that the word "used" in the amendment of 1903 excepting cars, etc., "used upon street railways" must be construed as having the same significance as the same word in the amendment making the act applicable to all cars, etc., "used on any railroad engaged in interstate commerce." From this premise it is insisted that as the latter provision has been construed as enlarging the scope of the act by causing it to embrace all cars used on interstate commerce railroads although at the particular time the cars are employed in intrastate commerce (*Southern Railway* v. *United States*, 222 U. S. 20), it must follow that the word "used" in the street railway excepting clause under consideration must have the same construction and therefore exclude from the operation of the act all cars used upon street railways, however temporary such use and however frequent or material may be their use in interstate commerce on other than street railways. Again it is urged that the judgment of the court below can be affirmed only by construing the word "used" in the exception as meaning exclusively used,—a construction which, it is said, would be wholly unwarranted in view of the amendment of 1896 excepting from the act certain cars, etc., "exclusively used for the transportation of logs" and the demonstration thereby afforded that if such a meaning had been contemplated by Congress in the amendment of 1903, the word "exclusively" would have been employed. But we think the want of merit in the contentions is clear and the unsoundness of the argument ad-

vanced to sustain them apparent. We say this because while it is conceded that the obvious purpose of Congress in enacting the law and its amendments was to secure the safety of railroad employees, and that the amendment of 1903 sought to enlarge and make that purpose more complete, yet it is insisted that the exception in the act should receive such a broad construction as would destroy the plain purpose which caused the act to be adopted. But to so treat the act would be in plain disregard of the elementary rule requiring that exceptions from a general policy which a law embodies should be strictly construed, that is, should be so interpreted as not to destroy the remedial processes intended to be accomplished by the enactment. That the meaning contended for would be in direct conflict with this rule would seem free from doubt, since the inevitable result of sustaining the contention would be to put it in the power of a railroad by operating a train for a trifling distance over tracks within the exception to thereby secure the right thereafter to operate such train over long distances without regard to compliance with the safeguards of the statute which otherwise would be controlling. And this reasoning disposes of the contention deduced from the use of the word "exclusively" in the provision excepting cars used on logging railroads and its absence in the street railway clause, since on the face of the statute the object of both provisions was to exempt both the logging and street railway cars from the operation of the act only when used for logging on the one hand and on street railways on the other, and not to exempt them when not so used.

The suggestion is made in argument that in any event the railroad company was not liable for the penalties because of the difficulty of equipping the twelve cars with grab-irons which would not interfere with the lateral movement of the radial couplers and because the other three cars were so constructed that they could not be

provided with automatic couplers and were used only on the one day because of unusually heavy traffic. But this merely asserts that the statute may be violated with impunity if only the railroad finds its provisions onerous or deems it expedient to do so.

2. It is contended that error was committed in rejecting the testimony of experts offered by the Railroad Company as to the protection afforded to employés by the openings in the buffers at the ends of the twelve cars. Without stopping to point out the inappositeness of the many authorities cited in support of the contention, we think the court was clearly right in holding that the question was not one for experts and that the jury after hearing the testimony and inspecting the openings were competent to determine the issue, particularly in view of the full and clear instruction given on the subject concerning which no complaint is made.

Affirmed.

MR. JUSTICE MCREYNOLDS took no part in the consideration and decision of this case.